IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY J. WILLARD, individually and as; Trustee of the Larry James Willard Trust Fund; and OVERLAND DEVELOPMENT CORPORATION, a California corporation,

Appellants,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual,

Respondents.
_____/

No. 77780

APPENDIX TO APPELLANTS' OPENING BRIEFS

VOLUME 18 OF 19

Submitted for all appellants by:

ROBERT L. EISENBERG (SBN 950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, NV 89519
775-786-6868
RICHARD D. WILLIAMSON (SBN 1001)
JONATHAN TEW (SBN 9932)
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, NV 89501
775-329-5600

ATTORNEYS FOR APPELLANTS
LARRY J. WILLARD, et al.

CHRONOLOGICAL INDEX TO APPELLANTS' APPENDIX

[1] This document was inadvertently omitted earlier. It was added here because al of the other papers in the 19-volume appendix had already been numbered.

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Richard D. Williamson, Esq., SBN 9932
Jonathan Joel Tew, Esq., SBN 11874
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Telephone: (775) 329-5600
Facsimile: (775) 348-8300
Attorneys for the Willard Plaintiffs

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual

Defendants.

Case No. CV14-01712

Dept. No. 6

BERRY-HINCKLEY INDUSTRIES a Nevada corporation; and JERRY HERBST, an individual,

Counterclaimants,

vs.

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation,

Counterdefendants.

OPPOSITION TO DEFENDANTS' MOTION TO STRIKE, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE SUR-REPLY

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Berry-Hinckley Industries ("BHI") and Defendant Jerry Herbst filed their Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply ("Motion to Strike") for the admitted purpose of giving them the last word on the Willard Plaintiffs' underlying Rule 60(b) Motion for Relief ("Rule 60 Motion"). Yet, no amount of procedural gamesmanship can distract from the uncontested fact that the Willard Plaintiffs' former attorney suffered a mental breakdown and violated his duties to this Court and his own clients through no fault of their own.

The Motion to Strike offers four arguments, each of which fail. First, Defendants argue that the Court should reject Exhibits 1 through 10 attached to the Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion for Relief ("Rule 60 Reply") because the Defendants did not have an opportunity to respond. Of course, the Defendants have now responded, so that argument is plainly untrue. Moreover, this argument is even belied by the Defendants' own practice of attaching exhibits to reply briefs. Both parties have attached exhibits to reply briefs when those exhibits are offered to rebut evidence or arguments raised in the opposition brief. The exhibits attached to the Rule 60 Reply were offered to address issues raised in Defendants' opposition brief. Therefore, they are appropriate and the Defendants' first argument fails.

The Motion to Strike next asserts that "portions" of some exhibits are inadmissible hearsay. Again, however, Defendants miss the mark. Specifically, Defendants challenge the foundation of Mr. Willard's statements regarding Brian Moquin's mental condition and personal life. (Mot. Strike at 4:20-5:11.) The Defendants also claim that any correspondence from Mr. Moquin or David O'Mara constitutes hearsay. (Id. at 5:12-18.) Yet, both of these assertions are untrue. Mr. Willard's declaration is plainly based upon his personal knowledge and his direct observations. The statements from Mr. Moquin and Mr. O'Mara are also not subject to the hearsay rule and, as explained below, are admissible at this stage anyway.

The Motion to Strike's third argument is that any communication that took place after the sanctions orders is somehow irrelevant. This is not true. Not only do recent communications plainly show Mr. Moquin's ongoing failure to comply with deadlines and his poor grip on

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Reno, Nevada 89501

reality, but they are also offered to rebut Defendants' assertion in their opposition brief that the Willard Plaintiffs should have obtained more evidence about Mr. Moquin's mental condition. As the Court can see, the Willard Plaintiffs and their new attorneys diligently sought to obtain a formal diagnosis and other information regarding Mr. Moquin's bipolar disorder. Unfortunately, despite his initial promises to provide such information, Mr. Moquin ultimately chose to compound his wrongdoing and failed to provide the promised documentation.

Defendants' final argument is to ask the Court for permission to file a sur-reply, which it unilaterally attached to its Motion to Strike. Thus, without leave of Court, Defendants went ahead and granted themselves the very relief they seek. While the Willard Plaintiffs believe this was improper, it is also now a *fait accompli*. Although the Willard Plaintiffs cannot "unring that bell" the Court should nonetheless deny the Motion to Strike.

Most importantly, nothing in the Motion to Strike or the Defendants' self-approved sur-reply actually offers any contrary evidence to rebut the critical and uncontested fact that Brian Moquin is suffering from severe mental illness which derailed this case. That is not the Willard Plaintiffs' fault. They deserve the opportunity to try their case on the merits, rather than forfeit millions of dollars in damages because their attorney suffered a mental breakdown.

II. LEGAL ARGUMENT

A. The Rule 60 Reply Properly Offered Rebuttal Evidence in Response to the Arguments in Defendants' Opposition Brief

Defendants' first argument is based on the false assertion that *any* exhibits attached to a reply brief should be disregarded. Clearly, the Defendants do not actually believe this, as they attached new exhibits to their own Reply in Support of Motion for Attorneys' Fees, which they filed on June 11, 2018. Therefore, despite their disingenuous arguments to the contrary, the Defendants apparently know the actual law: "Where the reply affidavit merely responds to matters placed in issue by the opposition brief and does not spring upon the opposing party new reasons for the [motion], reply papers--both briefs and affidavits--may properly address those issues." Baugh v. City of Milwaukee, 823 F. Supp. 1452, 1457 (E.D. Wis. 1993), aff'd, 41 F.3d 1510 (7th Cir. 1994); see also Rayon-Terrell v. Contra Costa County, 232 Fed. Appx. 626, 629

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n.2 (9th Cir. 2007) (holding evidence in a reply brief was not new where the reply "addressed the same set of facts supplied in Terrell's opposition to the motion but provides the full context to Terrell's selected recitation of the facts."); Carr v. Int'l Game Tech., 2013 U.S. Dist. LEXIS 23010, at *13 n.1 (D. Nev. Feb. 15, 2013) (finding that "the allegedly new evidence submitted with the reply was not new and ***was properly attached in response to arguments made in Defendants' opposition***." (emphasis supplied)).

Here, the evidence in the original Rule 60 Motion established Mr. Moquin's mental illness, Mr. Moquin's failure to meet deadlines, the plaintiffs' discovery of those issues, the Willard Plaintiffs' efforts to rectify those issues, the various points of equity and good cause supporting the Rule 60 Motion, and the underlying merits of the Willard Plaintiffs' case. In their Rule 60 Opposition, the Defendants challenged the timing and legitimacy of Mr. Moquin's mental breakdown, the sufficiency of the evidence regarding his mental illness, the timing of plaintiffs' awareness of Mr. Moquin's various problems, and the timing of the Willard Plaintiffs' efforts to correct Mr. Moquin's failures in this case. The Defendants also attached their own evidence, including a declaration of counsel, two hearing transcripts, the excerpt of a deposition transcript, the California State Bar's attorney search results for Mr. Moquin, and the plaintiffs' initial disclosure statement from 2014. Therefore, in the Rule 60 Reply, the Willard Plaintiffs properly focused their arguments and rebuttal evidence on the arguments raised in Defendants' opposition brief. In particular, the Rule 60 Reply directly addressed the Defendants' incorrect assertions and challenges to the timing and legitimacy of Mr. Moquin's mental breakdown, the timing of the Willard Plaintiffs'discovery of that breakdown and his failure to meet deadlines, the Willard Plaintiffs' efforts to gather responsive documentation from Mr. Moquin, and the timing of the Willard Plaintiffs' efforts to correct Mr. Moquin's failures.

Indeed, all of the exhibits attached to the Rule 60 Reply are solely focused on those arguments that the Defendants raised in their opposition. In Exhibit 1, Mr. Willard even states that he offered "this supplemental declaration in response to the claims and arguments made in the defendants' Opposition to Rule 60(b) Motion for Relief regarding lawyer Brian Moquin's personal and mental problems." Appropriately, Mr. Willard did not supplement anything

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regarding the underlying merits of his case, which the Defendants did not dispute. Exhibits 2, 3, 4, and 11 all addressed the timing of Mr. Willard's discovery that Mr. Moquin did not file the required briefs in December 2017, despite his repeated assurances that he would do so. Exhibit 5 corrects the Defendants' misstatements on the timing of Mr. Willard's discovery of Mr. Moquin's mental illness and his payment of Mr. Moquin's psychiatric bill. Exhibits 6 through 10 show the Willard Plaintiffs' diligent efforts to gather case files, mental health diagnoses, and other applicable documentation from Mr. Moquin. Finally, Exhibits 1, 2, 3, 4, 5, 7, 8, and 10 document Mr. Moquin's failures to respond to the Willard Plaintiffs and provide clear examples of Mr. Moquin's mental illness and personal problems.

Therefore, all of the exhibits attached to the reply were directly responsive to the arguments, issues, and evidence raised in Defendants' opposition. That is the function of a reply brief, and it is the way that Defendants themselves have used reply briefs in this case. Nothing in the reply brief supported a "new" argument or raised a "new" issue. Accordingly, under the parties' recognized briefing rules, and consistent with court holdings across the country, the Court must consider all of the rebuttal evidence attached to the Rule 60 Reply and should not give Defendants a sur-reply. Therefore, the Court should deny the Motion to Strike.

B. All of the Evidence Attached to the Rule 60 Reply Is Admissible

The Rule 60 Reply contains the following exhibits:

1. Declaration of Larry J. Willard in Response to Defendants' Opposition to Rule 60(b) Motion for Relief
2. Text messages between Larry Willard and Brian Moquin between December 2 and December 6, 2017
3. Email correspondence between David O'Mara and Brian Moquin
4. Text messages between Larry Willard and Brian Moquin between December 19 and December 25, 2017
5. A receipt for Dr. Douglas Mar's services to Brian Moquin
6. Email correspondence between Richard Williamson and Brian Moquin dated February 5 through March 21, 2018
7. Text messages between Larry Willard and Brian Moquin between March 30 and April 2, 2018
8. Email correspondence between Jonathan Tew, Richard Williamson and Brian Moquin dated April 2 through April 13, 2018
9. Letter from Richard Williamson to Brian Moquin dated May 14, 2018

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10. Email correspondence between Larry Willard and Brian Moquin dated May 23 through May 28, 2018

11. Notice of Withdrawal of Local Counsel

Defendants do not oppose exhibit 11, but dismissively claim that the remaining evidence is "rank hearsay, speculation, and inappropriate and unqualified lay expert opinions." Despite Defendants' rhetorical flourishes, a careful review of these exhibits actually shows that Defendants' claims are unsupported by the law. The exhibits are properly admitted.

The exhibits at issue generally fall into three categories. Exhibit 1 is Larry Willard's declaration. Exhibit 5 is a receipt for Dr. Mar's services. All of the other challenged exhibits (Exhibits 2-4 and 6-10) are correspondence.

i. Larry Willard's Declaration Is Valid and Admissible

The first exhibit at issue is Larry Willard's declaration. The Defendants' sole complaint with respect to Mr. Willard's declaration is that it is supposedly based on hearsay over which Mr. Willard has no personal knowledge. This argument fails for two reasons. First, as the declaration itself makes plain, most of the statements are based on Mr. Willard's own personal knowledge and perceptions. Second, just because some statements may constitute hearsay in a declaration does not mean that they are inadmissible for purposes of ruling on a motion.

a. The Willard Declaration Is Based on Personal Knowledge, Not Hearsay

Mr. Willard's declaration is primarily based upon his own personal knowledge. In the declaration, Mr. Willard expressly confirms "under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct." A declaration is admissible to the same extent as an affidavit. NRS 53.045. The declaration satisfies the requirements of that statute. Therefore, it is admissible.

Mr. Willard's declaration is also based upon his own personal knowledge – facts he personally perceived. For instance, Mr. Willard offers his initial impression that in 2014 Mr. Moquin "seemed to be a stable, accomplished lawyer with no known record of any bar complaints, misconduct, or other causes for concern." (Ex. 1 to Rule 60 Reply at ¶ 7.) Mr. Willard later explains, however, that Mr. Moquin suffered "what I can only describe as a total mental breakdown in December 2017." (Id. at ¶ 16.) As a lay witness, Mr. Willard can properly

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describe and explain what he perceives. NRS 50.265; Criswell v. State, 84 Nev. 459, 464, 443 P.2d 552, 555 (1968) ("A lay witness can give his opinion as to the sanity or insanity of a defendant, and the weight accorded his testimony is a question for the jury to determine."); see also Carter v. United States, 252 F.2d 608, 618 (D.C. Cir. 1957) ("Lay witnesses may testify upon observed symptoms of mental disease, because mental illness is characterized by departures from normal conduct.").

There are other facts that Mr. Willard personally perceived. Mr. Willard can undoubtedly testify to such claims as "I arranged to pay Dr. Mar for his services" and "I paid Dr. Mar's office $470 to pay for Mr. Moquin's treatment so that Mr. Moquin could get well and help us fix the case." (Ex. 1 to Rule 60 Reply at ¶¶ 39-40.) Similarly, Mr. Willard's declaration explains that he has "had to endure threats and claims from Mr. Moquin" and that "Mr. Moquin's emotional swings have become terrifying and impossible to predict." (Id. at ¶¶ 65-66.) Mr. Willard personally did and experienced all of those things, and so he has personal knowledge of the statements. They are not hearsay.

Mr. Moquin's admission that "Dr. Mar had diagnosed him with bipolar disorder" is also not hearsay. (Id. at ¶¶ 38.) A person's statement of his "then-existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health, is not inadmissible under the hearsay rule." NRS 51.105(1).

Similarly, any "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, ***or immediately thereafter***, is not inadmissible under the hearsay rule." NRS 51.085 (emphasis added). In addition, statements of marriage, divorce, and other personal history are not inadmissible under the hearsay rule. NRS 51.355(1).

b. The Defendants' Motion to Strike Misstates the Law

In their Motion to Strike, Defendants cite to two cases for the purported proposition that any hearsay testimony renders a Rule 60 motion defective. As is becoming alarmingly common, however, the Defendants have misstated the cases they cite.

First, Defendants cite to the case of Agnello v. Walker, 306 S.W.3d 666 (Mo. Ct. App. 2010) for the supposed proposition that "hearsay testimony or documentation cannot serve as the

evidence necessary to meet movant's burden of persuasion to set aside judgment under Rule 60." (Mot. Strike at 5:4-5.) Unfortunately, the Agnello case says nothing of the sort. Rather, it explains that what happened in that case was:

> [T]he Walker affidavits did **not** proffer any testimony relating to the "good cause" element of Rule 74.05(d). Likewise, no other competent evidence on that topic was offered to the trial court in advance of the trial court's ruling on the motion to set aside default judgment. Instead, Walker's counsel **argued** the element of "good cause" without any sworn testimony or other competent evidence.

Agnello, 306 S.W.3d at 673 (emphasis in original).[1] As opposed to the affidavits in the Agnello case, Mr. Willard's two declarations did contain extensive testimony on the excusable neglect and the good cause that justify setting aside the sanctions orders. For instance, all of the following statements in Mr. Willard's declaration are based on his personal knowledge; they go directly to the issue of excusable neglect and refute the Defendants' unsubstantiated claim in their Rule 60 Opposition that Mr. Willard was somehow aware of Mr. Moquin's problems, but "did nothing" to fix them:

- "I sent Mr. Moquin a text message on Saturday, December 2, 2017, to confirm that everything was moving forward okay."
- "When Mr. Moquin did not respond, I wrote to him the next day asking if I needed to review anything. Mr. Moquin did not respond again."
- "In fact, during the first week in December, I texted and/or called Mr. Moquin daily, often without receiving any response."
- "I expected that he would come through."
- "The next week I followed up with Mr. Moquin to ensure that he had filed the required documents"
- "I sent Mr. Moquin a text message on Tuesday, December 19, 2017, asking if the documents were almost finished."
- "The next day, however, Mr. Moquin failed to respond. I kept texting the next day and he still failed to respond."
- "After that, however, Mr. Moquin stopped responding again. I kept texting him until December 25 asking for an update and pleading with him to get the documents filed, but did not receive a response."
- "After Mr. Moquin suffered this mental breakdown, I recommended that he visit Dr. Douglas Mar, who is well-respected psychiatrist in Campbell, California."
- "I also started looking for other attorneys who might be able to help."

[1] Agnello was also decided under a completely different rule: Missouri Supreme Court Rule 74.05, not Rule 60. Mo. Sup. Ct. R. 74.05 does seem to serve a similar purpose as NRCP 60, but the two rules are not the same.

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- "After obtaining a loan from a friend, I arranged to pay Dr. Mar for his services, but I do not know if Mr. Moquin has continued with any course of treatment."
- "On March 13, 2018, I paid Dr. Mar's office $470 to pay for Mr. Moquin's treatment so that Mr. Moquin could get well and help us fix the case."
- "I then sent text messages on March 31, April 1, and April 2 urging Mr. Moquin to provide Mr. Williamson with everything he needed to try and reinstate this case."
- "Mr. Moquin's abusive and threatening language in his text dated April 2, 2018, is just one example of the abusive treatment I received from Mr. Moquin."
- "On Wednesday, May 23, 2018, I again wrote to Mr. Moquin begging him to provide a diagnosis letter from Dr. Mar . . . along with evidence that Mr. Moquin claims to possess that he timely disclosed our damage calculations and an affidavit from Mr. Moquin explaining his personal situation and how it impacted his performance in this case."
- "I have had to endure threats and claims from Mr. Moquin based on his view that I am somehow hurting him, his family, and his career."
- "Mr. Moquin's emotional swings have become terrifying and impossible to predict."
- "I am an innocent victim of Mr. Moquin's instability and believe that I deserve an opportunity to prove my case against the defendants."

(Ex. 1 to Rule 60 Reply at ¶¶ 18-20, 22, 27-30, 35, 36, 39, 40, 49, 52, 59, 65-67.)

The second case that Defendants cite is likewise inapposite. In that case, New Image Indus., Inc. v. Rice, 603 So. 2d 895 (Ala. 1992), New Image Industries, Inc. sought to set aside a default judgment on the ground of excusable neglect in failing to answer the complaint. The motion was supported by two affidavits – only one of which even attempted to address the question of "excusable neglect." New Image Indus., 603 So. 2d at 897. And that affidavit consisted of the following:

> Gurevitch stated that he was "informed and believed" that Lynn Unruh of New Image had received the complaint by certified mail on March 7, 1991, but, he suggested, because she was not New Image's regular receptionist, she did not understand where to direct it. He said that he was "informed and believed" that the complaint was "generally" addressed to "New Image," and the record indicates this to be correct.
>
> Gurevitch added that he "did not recall" being informed of the receipt of the complaint and that he first realized the existence of this action when he received a notice indicating that a default judgment had been entered. He stated that if he had known about the lawsuit in time to file a timely response he would have done so.

Id. Based on the New Image opinion, that was it.

Clearly, the New Image case is remarkably different from this one. Mr. Willard's two declarations contain numerous facts that are based on his personal knowledge, not information

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and belief. Those declarations provide ample detail of what he did, why, and when. The Defendants' desperate attempts to use ill-fitting analogies only emphasize that the actual facts in this case demand a different result. Mr. Willard's detailed, first-hand declarations are valid evidence that the Court should consider and follow in granting the Rule 60 Motion.

c. The Willard Declaration Properly Contains Evidence That Would Be Admissible in an Evidentiary Hearing

As explained above, Mr. Willard's declaration is based upon his own personal knowledge and the few facts that he obtained from Brian Moquin are not subject to the hearsay rule. Moreover, even when some statements constitute hearsay in a declaration, that evidence may still be used to support a motion. In fact, any declaration is by definition an out of court statement, and most declarations are offered to prove the truth of the matters asserted therein. This is true even of declarations offered in support of a motion for summary judgment, which has a higher and more difficult standard than a motion for relief under Rule 60.

As the Third Circuit has explained that "[w]hile the facts underlying the affidavit must be of a type that would be admissible as evidence, the affidavit itself does not have to be in a form that would be admissible at trial." Hughes v. United States, 953 F.2d 531, 543 (9th Cir. 1992) (internal citations omitted). "A party need not produce evidence at summary judgment in a form which would be admissible at trial so long as it is reducible to admissible evidence." Tukesbrey v. Midwest Transit, 822 F. Supp. 1192, 1198 n.7 (W.D. Pa. 1993). As the Ninth Circuit aptly explained: "At the summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents." Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003). In this case, Mr. Willard already has personal knowledge of most statements in his declaration. As for the few statements that could be classified as hearsay, Mr. Moquin's doctors, Mr. Moquin's wife, and certainly Mr. Moquin himself could all present direct testimony on those subjects. If needed, the parties could even pursue out-of-state discovery on these topics. Clearly, however, the Defendants do not actually challenge the accuracy of the statements in Mr. Willard's declaration. Rather, the Defendants are just raising procedural arguments to avoid the application of those uncontested facts.

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The truth is that Mr. Willard's declaration is valid and admissible. The vast majority of his statements are based on his own personal knowledge, so there is no basis to even question them. The handful of statements that are derived from Mr. Moquin's statements are either immune from the hearsay rule, or are still admissible at this stage since they could be directly provided in an evidentiary hearing. For all of these reasons, the Court must accept Mr. Willard's declaration in full.

ii. The Receipt for Dr. Mar Is Also Admissible

Defendants also challenge the receipt that Mr. Willard received from Dr. Douglas Mar. That receipt was placed at issue by Defendants' unsupported argument in their opposition that because Mr. Willard "recommended a psychiatrist to Mr. Moquin" and "borrowed money from a friend to pay for Mr. Moquin's treatment" that it is somehow "abundantly clear that Mr. Willard was fully-aware of Mr. Moquin's alleged problems, yet continued to allow Mr. Moquin to represent Plaintiffs." (Rule 60 Opp'n at 15:6-10.) Yet, the Defendants' unfounded claims are contrary to the actual facts.

As Mr. Willard explained in his supplemental declaration, Mr. Willard did not learn of Mr. Moquin's diagnosis until January 2018. (Ex. 1 to Rule 60 Reply at ¶¶ 37-38.) Mr. Willard goes on to explain that he then secured a loan from a friend and made arrangements to pay for Mr. Moquin's psychiatric treatment. (Id. at ¶ 39.) Mr. Willard further explains that he paid Mr. Moquin's psychiatrist on March 13, 2018. (Id. at ¶ 40.) The receipt is corroboration of that payment. Both of these facts are within Mr. Willard's personal knowledge. At a trial or in an evidentiary hearing, he could and would testify to those very same facts and lay the foundation for the receipt he received from Dr. Mar's office. As noted above, in the context of reviewing evidence attached to a motion, courts "do not focus on the admissibility of the evidence's form" but "instead focus on the admissibility of its contents." Fraser, 342 F.3d at 1036. Therefore, Mr. Willard's statements and his supporting receipt are properly admissible as exhibits.

iii. All of the Correspondence with Brian Moquin Is Admissible

Defendants next challenge Exhibits 2 through 4 and 6 through 10, which are text messages, emails, and other correspondence between Brian Moquin and Mr. Willard or his other

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attorneys. Again, in reviewing evidence attached to motions, courts "do not focus on the admissibility of the evidence's form" and "instead focus on the admissibility of its contents." Fraser, 342 F.3d at 1036. In that case, the Ninth Circuit explained that a diary could be admitted into evidence, even though the statements in the diary were clearly hearsay. Id., 342 F.3d at 1037. Just as the author of a diary could appear and testify in court, so could the authors of any of the letters and text messages attached to the Rule 60 Reply. Therefore, they are all admissible.

In addition, even ignoring the rule in Fraser, the correspondence is still not excluded under the hearsay rule. All of Mr. Moquin's statements regarding his mental health, divorce, and other personal problems are statements of his "then-existing state of mind, emotion, sensation or physical condition," which constitutes an exception to the hearsay rule. NRS 51.105(1). Similarly, statements of divorce or other personal history are not inadmissible under the hearsay rule. NRS 51.355(1). Importantly, the statements also describe or explain events and conditions that Mr. Moquin personally perceived and which he was describing while or immediately after he perceived them. This is another exception to the hearsay rule. NRS 51.085.

Finally, Nevada's hearsay laws also explain that a statement should not be excluded by the hearsay rule "if its nature and the special circumstances under which it was made offer assurances of accuracy" that are not likely to be enhanced by calling the declarant as a witness. NRS 51.075(1). As the Court can see for itself, Exhibits 2 through 4 and 6 through 10 all show the efforts that Mr. Willard and his attorneys made to contact Mr. Moquin, work with Mr. Moquin, and obtain files from Mr. Moquin. There is no concern about inaccuracy because the statements were made privately between attorneys and their client. They also do not bear on the merits of the case. In fact, the subjects of these exhibits are collateral to the merits of this case, they are only offered now because the Defendants claimed that the Willard Plaintiffs knew of Mr. Moquin's problems and yet "did nothing" to address them. Mr. Willard's own testimony should sufficiently refute this claim and justify granting the Rule 60 Motion. The other admissible exhibits attached to the Rule 60 Reply rebut Defendants' baseless claims to the contrary, and underscore the fact that the Willard Plaintiffs did what any reasonable person would have done in their situation. Therefore, the Court should deny the Motion to Strike.

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C. The Evidence Attached to the Rule 60 Reply Is Relevant and Responds to the Exhibits and Arguments Raised in Defendants' Opposition

The Defendants incorrectly assert that the evidence attached to the Rule 60 Reply is irrelevant to the question of excusable neglect. They are wrong, as the evidence confirms that Mr. Moquin was suffering from a myriad of personal crises that affected his performance in this case and his ability to meet basic deadlines. Indeed, the evidence attached to the Rule 60 Reply is expressly offered as rebuttal evidence to the Defendants' arguments on those points.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. All relevant evidence is generally admissible. NRS 48.025.

Although it is unrelated to the underlying merits of the case, the Defendants' Rule 60 Opposition challenged whether Mr. Moquin was really suffering from mental illness, whether his personal problems affected the case, and whether the Willard Plaintiffs took appropriate steps to address Mr. Moquin's failures. Thus, for purposes of briefing the Rule 60 Reply, any exhibit "having any tendency" to make the existence of those facts "more or less probable" is relevant. NRS 48.015. Therefore, unless expressly excluded under Nevada's rules of evidence, those exhibits are admissible. NRS 48.025.

In his declaration, Mr. Willard explained that he was offering the "supplemental declaration in response to the claims and arguments made in the defendants' Opposition to Rule 60(b) Motion for Relief regarding lawyer Brian Moquin's personal and mental problems." (Ex. 1 to Rule 60 Reply at ¶ 2.) Notably, the Defendants did not challenge any of the evidence or arguments from the Rule 60 Motion on the subject of their meritorious claims for relief. Rather, the Rule 60 Opposition solely focused on whether Brian Moquin's mental breakdown was real, whether it had any impact on the case, and whether the Willard Plaintiffs did anything about it. Therefore, Mr. Willard's supplemental declaration focused on those issues.

Defendants' Rule 60 Opposition also simply misconstrued numerous facts, which forced the Willard Plaintiffs to provide rebuttal evidence showing that Defendants' claims were false. For instance, one critically-false portion of Defendants' Rule 60 Opposition asserted as follows:

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> Mr. Willard admits that he was aware of Mr. Moquin's personal financial problems and that he loaned Mr. Moquin money to assuage those problems, that he was aware of Mr. Moquin's alleged psychological problems and loaned him money for treatment, and that he was aware that Mr. Moquin was not responsive prior to the dismissal of his claims yet did nothing because he was not financially able to hire new counsel (though he was apparently able to obtain funds to allow him to hire his current counsel). This does not constitute excusable neglect.

(Rule 60 Opp'n at 4:25-5:4 (emphasis in original).)

As explained above, the Defendants' insinuation that the Willard Plaintiffs were aware of Mr. Moquin's bipolar disorder before January 2018 is simply false. Therefore, the Willard Plaintiffs' Rule 60 Reply provided rebuttal evidence in direct response to the Defendants' false assertions and misstatements of the record.

Defendants also claim that Mr. Moquin's post-sanctions conduct is irrelevant. Again, however, that is not true. First, Defendants claim that the Willard Plaintiffs did not provide enough evidence of Mr. Moquin's condition and that they "did nothing" to fix the problems that Mr. Moquin had created. The exhibits attached to the Rule 60 reply debunk both assertions, and are therefore relevant rebuttal evidence.

Second, evidence of Mr. Moquin's mental illness and aberrant behavior in early 2018 is also directly relevant to the question of his mental health in December 2017.

"Under the state of mind exception, hearsay evidence is admissible if it bears on the state of mind of the declarant and if that state of mind is an issue in the case." United States v. Pheaster, 544 F.2d 353, 376 (9th Cir. 1976); accord White v. State, 2017 Nev. Unpub. LEXIS 301 at *3, 394 P.3d 209 (Nev. April 26, 2017).

As one court explained, "out-of-court statements which are offered to prove the declarant's state of mind are not within the interdiction of the hearsay rule. For example, when the declarant's sanity or competency are in issue, statements indicating the presence or absence of either of these mental traits are properly received as evidence." Commonwealth v. Wright, 317 A.2d 271, 274 (Pa. 1974); accord Brown v. Williams, No. 2:10-cv-00407-PMP-GWF, 2012 U.S. Dist. LEXIS 105463, at *12 (D. Nev. July 30, 2012) (allowing limited discovery into a party's mental health because "petitioner's mental health condition at one time potentially can have relevance to his condition at another time or overall.").

D. Defendants' Sur-Reply Is Improper, But Also Cannot Avoid the Uncontested Reality that Brian Moquin Is Solely at Fault in this Case and the Willard Plaintiffs Should Be Entitled to Proceed with the Merits of Their Case

As with their motion to exceed page limits, the Defendants have a curious way of just granting themselves the very relief they seek. Now, along with their Motion to Strike, the Defendants have attached an as-yet-unapproved sur-reply.[2] As explained above, however, the Defendants are not entitled to a sur-reply.

All of the exhibits attached to the Rule 60 Reply were directly responsive to the arguments, issues, and evidence raised in Defendants' opposition. The Rule 60 Reply did not raise any "new" arguments or issues. Rather, it only offered rebuttal exhibits in response to the arguments and exhibits that Defendants included in their opposition. Therefore, the exhibits attached to the Rule 60 Reply are appropriate. See, e.g., Baugh, 823 F. Supp. at 1457; Carr, 2013 U.S. Dist. LEXIS 23010, at *13 n.1. Accordingly, the Court should deny the Motion to Strike and disregard the Defendants' sur-reply.

Most importantly, nothing in either the Motion to Strike or the proposed sur-reply actually offers any contrary evidence to rebut the critical and uncontested fact that Brian Moquin has bipolar disorder and suffered a mental breakdown that derailed this case.

III. CONCLUSION

The Defendants are desperately trying to disregard the truth and hold on to the forfeit that Brian Moquin's unfortunate failures provided to them. Thus, rather than address the merits of this case, they challenge the sufficiency of the undisputed evidence regarding Mr. Moquin's mental illness and other personal struggles. Similarly, instead of properly addressing the Supreme Court's required factors under Yochum v. Davis, 98 Nev. 484, 653 P.2d 1215 (1982)

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[2] The Defendants' proposed sur-reply also violates the Court's Pretrial Order, which specifically states that "reply memoranda may not exceed five pages in length." (Pretrial Order at 5:20-21.) The Pretrial Order goes on to explain that "[a] party may file memoranda that exceeds these limits only with prior approval of the court, upon a showing of extraordinary circumstances." (Id. at 5:21-23 (emphasis in original).) Incredibly, this improper sur-reply comes just a few weeks after Plaintiffs' Opposition to Defendants' Motion to Exceed Page Limit, which reminded Defendants of these very page limits and the required procedure to change them. Therefore, Defendants' repeated refusal to comply with the Pretrial Order provides another reason for the Court to reject the sur-reply.

Robertson, Johnson, Miller & Williamson
50 West Liberty Street, Suite 600
Reno, Nevada 89501

and Young v. Johnny Ribeiro Bldg., 106 Nev. 88, 787 P.2d 777 (1990), the Defendants instead liberally quote from the sanctions order that they drafted and submitted without opposition from Mr. Moquin. Now, with no answer to the mountain of evidence justifying the Willard Plaintiffs' Rule 60 Motion, the Defendants have decided to file this Motion to Strike.

This case has had enough side shows. It is time to confront the merits. Therefore, the Court should deny the Motion to Strike, it should disregard the unauthorized sur-reply, and it should grant the Willard Plaintiffs' Rule 60 Motion.

Affirmation

Pursuant to NRS § 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 22nd day of June, 2018.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

By: */s/ Richard D. Williamson*
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
Attorneys for the Willard Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 22nd day of June, 2018, I electronically filed the foregoing **OPPOSITION TO DEFENDANTS' MOTION TO STRIKE, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE SUR-REPLY** with the Clerk of the Court by using the ECF system which served the following parties electronically:

John P. Desmond, Esq.
Brian R. Irvine, Esq.
Anjali D. Webster, Esq.
Dickinson Wright
100 West Liberty Street, Suite 940
Reno, NV 89501
Attorneys for Defendants/Counterclaimants

/s/ Amy Sprinkle
An Employee of Robertson, Johnson,Miller & Williamson

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Clerk of the Court
Transaction # 6754895 : yviloria

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DICKINSON WRIGHT, PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (775) 786-0131
Email: Jdesmond@dickinsonwright.com
Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

Attorney for Berry Hinckley Industries and Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;

Defendants.
_____/

CASE NO. CV14-01712

DEPT. 6

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.

_____/

REPLY IN SUPPORT OF MOTION TO STRIKE, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE SUR-REPLY

Defendants/Counterclaimants Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively the "Defendants") by and through their counsel of record, Dickinson Wright, PLLC, respectfully submit this Reply in support of their Motion to Strike 10 of the 11 exhibits submitted by Plaintiffs in their reply in support of their Rule 60(b) Motion. Defendants also submit this Reply in support of their alternative Motion for Leave to File Sur-Reply responding to the new exhibits.

Plaintiffs attempt to characterize Defendants' Motion to Strike as "procedural gamesmanship" and a "side show." Opposition to pp. 1, 15. However, these characterizations are both unnecessary and incorrect. Defendants are simply seeking to ensure that the evidence considered by this Court in deciding the Rule 60(b) Motion is competent and admissible and that Defendants have the opportunity to respond to any such competent and admissible evidence as a matter of due process.

As noted in the Motion to Strike, "courts typically do not consider new evidence first submitted in a reply brief because the opposing party has no opportunity to respond to it." *Crandall v. Starbucks Corp.*, 249 F.Supp.3d 1087, 1104 (N.D.Cal. 2017) (citing *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (citation omitted) ("Where new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond."). Plaintiffs do not challenge this premise; rather, they argue that the new exhibits attached to their Reply are appropriate for this Court to consider because they constitute rebuttal evidence. However, this argument is belied by a review of the briefing on the Rule 60(b) Motion.

Plaintiffs chose to support their claim of excusable neglect in the Rule 60(b) Motion with a declaration from Mr. Willard that appears to be deliberately vague as to the timing of his

discovery of Mr. Moquin's alleged mental problems and Mr. Willard's actions taken in response to that discovery, presumably because Plaintiffs knew that including an accurate timeline would not support their argument of excusable neglect. When Defendants pointed out the vague nature of Plaintiffs' argument, Plaintiffs decided to attach another declaration from Mr. Willard to their Reply, along with ten other new exhibits, most of which predate the filing of the Rule 60(b) Motion and could simply have been included with the original filing. None of the new exhibits address anything new; they all address alleged facts that were presented by Plaintiffs in their Rule 60(b) Motion, not facts raised by Defendants in their Opposition. Plaintiffs' choice to withhold these documents from the Rule 60(b) Motion and instead attach them to the Reply was strategic and constitutes nothing more than briefing by ambush. This Court should not countenance such conduct and should strike Exhibits 1-10 from the Reply.

In addition, most of the new evidence attached to the Reply should be stricken as that evidence is hearsay and speculative. Specifically, Paragraphs 11, 14, 15, 16, 33 and 38 to Mr. Willard's declaration contain allegations about Mr. Moquin's financial situation, mental health and medical diagnosis and alleged marital conflict. *See* Reply at Exhibit 1. These allegations, due to the fact that they are all intensely personal to Mr. Moquin and could only be known by Mr. Moquin or his spouse, cannot simply be "observed" or "perceived" by a third party such as Mr. Willard.[1] Such alleged facts could only be obtained via hearsay statements made by Mr. Moquin or his spouse or from hearsay documents. Or, such alleged facts would be pure speculation.

Plaintiffs attempt to overcome this situation simply by claiming, without factual or legal support, that Mr. Willard's declaration was based upon his personal knowledge. Opposition at pp. 5-6. However, simply stating this does not make it so. There is simply no way that Mr. Willard could perceive and thus have personal knowledge of Mr. Moquin's financial situation,

[1] Also, Mr. Moquin resides in the San Jose, California area. Defendants are informed and believe that Mr. Willard currently resides in Texas and could not have personally viewed any of the alleged facts about Mr. Moquin contained in Mr. Willard's declaration.

mental health and alleged marital conflict unless he heard that information from Mr. Moquin or his wife or gleaned the information from documents. This is hearsay, not personal knowledge based upon Mr. Willard's perceptions. Plaintiffs' other argument, that Mr. Willard's testimony about Mr. Moquin's statement about his medical diagnosis is admissible pursuant to NRS 51.105(1) as a statement of Mr. Moquin's then-existing bodily condition, is likewise unavailing, as Mr. Willard does not testify as to any contemporaneous statements that Mr. Moquin made about his own present physical symptoms or feelings. *See* 2 McCormick on Evid. §273 (7th ed.) ("[s]tatements of the declarant's present bodily condition and symptoms, including pain and other feelings, offered to prove the truth of the statements, have been generally recognized as an exception to the hearsay rule. Special reliability is provided by the spontaneous quality of the declarations, assured by the requirement that the declaration purport to describe a condition presently existing at the time of the statement.") (emphasis added). The statement that Mr. Willard included, that "Mr. Moquin explained [to Mr. Willard] that Dr. Mar had diagnosed him with bipolar disorder" *see* Reply at ¶38, does not address Mr. Moquin's then present physical condition or symptoms; instead that statement contains hearsay within hearsay, and is thus inadmissible under NRS 51.067. *See also* Opposition to Rule 60(b) Motion at p. 9, n.5. Accordingly Paragraphs 11, 14, 15, 16, 33 and 38 to Mr. Willard's declaration should be stricken as containing hearsay or because they are speculative.

Other new exhibits attached to the Reply also contain inadmissible hearsay that should not be considered. Specifically, all of the texts and emails offered by Plaintiffs that were authored by Mr. Moquin or Mr. O'Mara constitute inadmissible hearsay under NRS 51.035 and 51.065. Plaintiffs attempt to avoid this conclusion by arguing that such exhibits need not be admissible now, so long as they potentially could be admitted at some point in the future. Opposition at pp. 9-10. However, this is incorrect in a Rule 60(b) setting, as a party seeking to set aside an order pursuant to NRCP 60(b) "has the burden to prove mistake, inadvertence, surprise, or excusable neglect by a preponderance of the evidence." *Polivka v. Kuller*, 128 Nev. 926, 381 P.3d 651 (2012) (citations omitted); *see also Stoecklein v. Johnson Electric, Inc.*, 109

Nev. 268, 271, 849 P.2d 305, 307 (1993) (district court's discretion to grant a Rule 60(b) motion "is a legal discretion and cannot be sustained where there is no competent evidence to justify the court's action.") (emphasis added).[2] Plaintiffs have had their opportunity to present this Court with competent, admissible evidence to meet their burden of showing excusable neglect and have simply failed to do so. Accordingly, this Court should decline to consider all of Exhibit 3, the text messages authored by Mr. Moquin in Exhibit 4, the text messages authored by Mr. Moquin in Exhibit 7, the email authored by Mr. Moquin in Exhibit 8, and the emails authored by Mr. Moquin in Exhibit 10.

Finally, a number of the exhibits attached to the Reply should be stricken as irrelevant. Specifically, all of Mr. Willard's statements in his Declaration after Paragraph 32 deal with incidents and/or communications that took place after this Court had issued its January 4, 2018 Order. *See* Reply at Exhibit 1, ¶¶33-67, all of which detail events and communications from late January 2018 through late May 2018. Similarly, Exhibits 5-10 to the Reply contain only communications and descriptions of events that took place after this Court had already ruled on Defendants' Motion for Sanctions. As such, they are simply not relevant to this Court's determination of whether Plaintiffs have met their burden of proving excusable neglect under NRCP 60(b).

Plaintiffs' arguments, that such exhibits were used to "debunk" Defendants' arguments that Plaintiffs did not provide enough evidence of Mr. Moquin's alleged condition and that Plaintiffs did nothing to fix the problems with their case, simply misses the boat. Anything that took place after this Court issued its Sanctions Order is wholly irrelevant, as that is the Order

[2] Plaintiffs also claim that Defendants misstated two cases holding that hearsay statements cannot support a motion to set aside judgment. However, the cases were cited appropriately for that proposition. *See Agnello v. Walker*, 306 S.W.3d 666, 675 (Mo. App. 2010) (affirming the trial court's exclusion of a hearsay letter from the movant's prior counsel and holding that "as a matter of law, unsworn hearsay testimony or documentation cannot serve as the evidence necessary to meet movant's burden of persuasion."); *New Image Industries, Inc. v. Rice*, 603 So.2d 895, 897 (Ala. 1992) (upholding trial court's ruling that an affidavit was not sufficient to prove excusable neglect where the affidavit consisted of "inadmissible hearsay and speculation.").

Plaintiffs are seeking to set aside through their Rule 60(b) Motion. Likewise, anything Plaintiffs did to try and fix the problems with their case after the issuance of the Sanctions Order is irrelevant to a consideration of excusable neglect. Plaintiffs must provide competent evidence explaining not only why their failure to oppose the sanctions motion was excusable, but also why their refusal to provide an NRCP 16.1 damages disclosure and an appropriate expert disclosure of Daniel Gluhaich was excusable. No evidence of events that occurred after the issuance of the Sanctions Order can possibly be relevant to those issues.

Accordingly, Defendants respectfully request that this Court enter an Order striking Exhibits 1-10 to Plaintiffs' Reply in support of their Rule 60(b) Motion. In the alternative, Defendants request that this Court enter an Order allowing Defendants to file the Sur-Reply attached to the Motion to Strike/Motion for Leave as Exhibit 1.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 29th day of June, 2018.

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine
JOHN P. DESMOND
BRIAN R. IRVINE
ANJALI D. WEBSTER
Attorney for Defendants Berry Hinckley Industries, and Jerry Herbst

CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached **REPLY IN SUPPORT OF MOTION TO STRIKE, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE SUR-REPLY** on the parties through the Second Judicial District Court's E-Flex filing system to the following:

Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Attorneys for Plaintiffs/Counterdefendants

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
3287 Ruffino Lane
San Jose, California 95148

DATED this 29th day of June, 2018.

/s/ Mina Reel
An employee of DICKINSON WRIGHT PLLC

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Clerk of the Court
Transaction # 7001598

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;

Defendants.
_____/

CASE NO. CV14-01712

DEPT. 6

ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants[1].
_____/

[1] On April 13, 2018, this Court entered its *Order of Dismissal of Claims of Wooley Plaintiffs with Prejudice*. On the same date, this Court entered its *Order Granting Defendants/ Counterclaimants' Motion to Dismiss Counterclaims*. All counterclaims were dismissed by said Order.

ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

Before this Court is Plaintiffs' Rule 60(b) Motion for Relief ("*Rule 60(b) Motion*") filed by PLAINTIFFS LARRY J. WILLARD, INDIVIDUALLY AND AS TRUSTEE OF THE LARRY JAMES WILLARD TRUST FUND AND OVERLAND DEVELOPMENT CORPORATION, A CALIFORNIA CORPORATION (collectively, "Willard" or the "Plaintiffs"), by and through counsel, Robertson, Johnson, Miller & Williamson.[2] By their *Rule 60(b) Motion*, Plaintiffs seek, pursuant to NRCP 60(b), to set aside: (a) this Court's January 4, 2018, *Order Granting Defendants/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich*; (b) this Court's January 4, 2018, *Order Granting Defendants' Motion for Sanctions*; and (c) this Court's March 6, 2018, *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions*.

Thereafter, DEFENDANTS BERRY-HINCKLEY INDUSTRIES ("BHI") AND JERRY HERBST (collectively, "Defendants"), filed their *Opposition to Rule 60(b) Motion for Relief,* by and through their counsel, Dickinson Wright, PLLC.

Plaintiffs then filed their *Reply in Support of the Willard Plaintiffs Rule 60(b) Motion for Relief* and the parties set the matter for hearing.

This Court carefully considered the papers submitted, the arguments of counsel, the entire court file herein, and is fully advised in the premises, and enters its order as follows.

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[2] Plaintiffs' former local counsel was David O'Mara of the O'Mara Law Firm, P.C. Mr. O'Mara filed a *Notice of Withdrawal of Local Counsel ("Notice"), on March 15, 2018.* Brian Moquin remains counsel of record as he has not withdrawn; however, he is not indicated as counsel filing the *Rule 60(b) Motion.*

FINDINGS OF FACT

The Court makes the following Findings of Fact:

Plaintiffs' Complaint

1. On August 8, 2014, Plaintiffs commenced this action by filing their *Complaint* against Defendants.[3] *Complaint*, generally.

2. By way of their *Complaint* and subsequent *First Amended Complaint,* Plaintiffs sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for $19,443,836.94, discounted by 4% per the lease to $15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. *First Amended Complaint* ("*FAC*"), generally.

3. Willard also sought several other categories of damages which have since been dismissed or withdrawn. May 30, 2017, *Order.*

Plaintiffs' Failure to Comply with the Nevada Rules of Civil Procedure and this Court's Orders

4. Plaintiffs failed to provide a compliant damages disclosure in this action.

5. Plaintiffs failed to provide a damages computation in their initial disclosures, as required under NRCP 16.1(a)(1)(C). *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* ("*Sanctions Order*") ¶ 12, and failed to provide damages computations at any time despite numerous demands on both Mr. Moquin and Mr. O'Mara. *Sanctions Order* ¶¶ 14-16, 25, 27-33, 39, 43-44 and 51-54.

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[3] Willard filed the initial complaint jointly with Edward E. Wooley and Judith A. Wooley, individually and as Trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). However, Defendants and Wooley entered into a settlement agreement and stipulation for dismissal. This Court entered its Order on April 13, 2018 dismissing Wooley's claims with prejudice.

6. Plaintiffs failed to provide complete and adequate responses to interrogatories requesting information about Plaintiffs' damages in the normal course of discovery.

7. Plaintiffs failed to provide complete and adequate responses to interrogatories in violation of this Court's *Order Granting Defendants' Motion to Compel* and failed to comply with this Court's *Order* ("*January Hearing Order*") issued after the parties discussed Plaintiffs' failure to provide damages computations at the January 10, 2017 hearing attended by Mr. Moquin, Mr. O'Mara and Mr. Willard. *Sanctions Order* ¶¶ 17-25.

8. The *January Hearing Order* required Plaintiffs to provide damages computations and supporting materials. *Sanctions Order* ¶¶ 46-49, 54, 59-64 and 67-68; *Defendants' Opposition Plaintiffs' Rule 60(b) Motion*, Ex. 2, *Transcript* of January 10, 2017 Hearing at pp. 61-63 and 68; *January Hearing Order.*

9. Plaintiffs failed to properly disclose Daniel Gluhaich as an expert witness as required by NRCP 16.1(a)(2). *Sanctions Order* ¶¶ 34-37.

10. In contravention of this Court's *January Hearing Order*, Plaintiffs failed to provide an amended disclosure of Mr. Gluhaich, although Defendants' counsel made multiple requests. *Sanctions Order* ¶¶ 38-45, ¶¶ 50-64.

Plaintiffs' Summary Judgment Motion

11. Pursuant to the February 9, 2017, *Stipulation and Order to Continue Trial,* discovery closed in mid-November, 2017.

12. On October 18, 2017, less than a month before the close of discovery, Plaintiffs filed their *Motion for Summary Judgment* asserting they were entitled, as a

matter of law, to more than triple the amount of damages alleged in and requested by their *First Amended Complaint*. *Sanctions Order* ¶¶ 69 and 73.

13. The damages asserted in Plaintiffs' *Motion for Summary Judgment* were not previously disclosed. The motion was also supported by previously undisclosed expert opinions and documents. *Sanctions Order* ¶¶ 74-79.

14. On November 13, 2017, Defendants filed their Opposition to Plaintiffs' *Motion for Summary Judgment*.

15. Plaintiffs' did not submit the *Motion for Summary Judgment* for decision.

Defendants' *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* and *Motion for Sanctions*

16. On November 14, 2017, Defendants filed their *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("*Motion to Strike*").

17. In the *Motion to Strike*, Defendants maintained this Court should preclude Plaintiffs from offering Mr. Gluhaich's testimony on the grounds: (a) Plaintiffs failed to adequately disclose Mr. Gluhaich as an expert because they failed to provide "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B); (b) the opinions offered by Mr. Gluhaich in support of Plaintiffs' *Motion for Summary Judgment* were based upon inadmissible hearsay and were based solely on the opinions of others; and (c) Mr. Gluhaich was not qualified to offer the opinions included in his Declaration attached to and filed in support of Plaintiffs' *Motion for Summary Judgment*.

18. On November 15, 2017, Defendants filed their *Motion for Sanctions ("Sanctions Motion")*.

19. In the *Sanctions Motion*, Defendants argued this Court should sanction Plaintiffs for their continued and intentional conduct in failing to comply with the Nevada Rules of Civil Procedure and this Court's orders requiring Plaintiffs to provide damages computations and full and adequate expert disclosures, and dismiss Plaintiffs' claims with prejudice, or, in the alternative, preclude Plaintiffs from seeking new damages or relying upon their undisclosed expert and appraisals.

20. Defendants agreed to give Plaintiffs' several extensions of time to oppose the *Motion to Strike* and *Sanctions Motion*, but no oppositions were filed.

21. On December 6, 2017, Plaintiffs requested relief from the Court by extension to respond until "December 7, 2017 at 4:29 p.m." *Sanctions Order* ¶ 94; *Plaintiffs' Request for a Brief Extension of Time ("Brief Extension Request"),* generally.

22. This Court held a status conference on December 12, 2017, attended by Defendants' counsel and Plaintiffs' counsel, Mr. Moquin and Mr. O'Mara. At the status conference, after observing Mr. Moquin, having significant dialog with Mr. Moquin, and over vehement objection by the Defendants' counsel, this Court granted *Plaintiffs' Brief Extension Request* plus granted more time than that requested. The Court directed Plaintiffs to respond to the outstanding motions no later than Monday, December 18, 2017, at 10:00 am. *Sanctions Order* ¶ 95.

23. Tis Court further directed Defendants to file their reply briefs no later than January 8, 2018. The Court set the parties' outstanding Motions for oral argument on January 12, 2018. *Sanctions Order* ¶ 96.

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24. This Court admonished Plaintiffs, stating "you need to know going into these oppositions, that I'm very seriously considering granting all of it . . . I haven't decided it, but I need to see compelling opposition not to grant it." *Opposition to Rule 60(b) Motion*, Ex. 3, December 12, 2017, *Transcript of Status Conference*, in part.

25. Plaintiffs did not file an opposition or response to the *Motion to Strike* or *Motion for Sanctions* by December 18, 2017 or any time thereafter, nor did Plaintiffs request any further extension.

26. This Court entered its *Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* on January 4, 2018 ("*Order Granting Motion to Strike*").

27. This Court entered its *Order Granting Defendants'/Counterclaimants' Motion for Sanctions* on January 4, 2018 ("*Order Granting Sanctions*").

28. This Court entered its *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* on March 6, 2018. ("*Sanctions Order*")[4]

Withdrawal of Local Counsel

29. Mr. O'Mara's *Notice of Withdrawal of Local Counsel, ("Notice")* filed March 15, 2018, states, "Mr. Moquin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such a response." *Notice*, 1.

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[4] The *Order Granting Sanctions* ordered sanctions and directed Defendants to "submit a Proposed Order granting *Defendants'/Counterclaimants' Motion for Sanctions*, including factual and legal analysis and discussion, to Department 6 within twenty (20) days of the date of this *Order* in accordance with WDCR 9." *Order Granting Sanctions, 4.* For purposes of the instant motion, the Court considers the *Order Granting Sanctions* and *Sanctions Order*, as one for purposes of the analysis herein.

30. The *Notice* describes the terms of retention of Mr. O'Mara as, "Undersigned Counsel was retained solely as local counsel, and provided Mr. Moquin with the necessary information related to the Court's filing requirement and timelines. Undersigned Counsel was retained only to provide services as directed by Mr. Moquin, and would be relieved of services if Mr. Moquin was removed." *Notice*, 1.

Plaintiffs' *Rule 60(b) Motion*

31. On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a notice of appearance on behalf of Plaintiffs.

32. On April 18, 2018, Plaintiffs filed the *Rule 60(b) Motion*. In the *Rule 60(b) Motion*. Plaintiffs argue this Court should set aside its *Order Granting the Motion to Strike, Order Granting Sanctions,* and *Sanctions Order,* based upon Mr. Moquin's excusable neglect. Plaintiff's further argue the underlying *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 787 P.2d 777 (1990) because the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for the misconduct of their attorney.

33. Plaintiffs argue their failure to provide the damages computations and adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure and this Court's orders, as well as their failure to file oppositions to the *Motion to Strike* and *Motion for Sanctions* were all due to Mr. Moquin failing "to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Rule 60(b) Motion,* 1.

34. The *Rule 60(b) Motion* purports to support its arguments primarily through the *Declaration of Larry J. Willard. Rule 60(b) Motion,* Ex. 1 (*"Willard Declaration" and "WD"* in citations to the record)[5].

35. The *Willard Declaration* includes several statements about Mr. Moquin's alleged mental disorder. It states Mr. Willard is "**convinced**" Mr. Moquin was dealing with issues and demons beyond his control. *WD* ¶ 66. It further states he "**learned**" that Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work. *WD* ¶ 67. The *Willard Declaration* states Mr. Moquin suffered a "total mental breakdown." *WD* ¶ 68. It states Mr. Moquin **explained** to Mr. Willard he had been diagnosed with bipolar disorder. *WD* ¶ 70. He declares he believes Mr. Moquin's disorder to be "severe and debilitating." *WD* ¶ 73. He states he **now sees** "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on the case." *WD* ¶ 76. And, Mr. Willard declares he **can now see** how Mr. Moquin's alleged psychological issues affected Plaintiffs' case. *WD* ¶ 87 (emphasis supplied).

36. The *Rule 60(b) Motion* also includes an internet printout purporting to list symptoms of bipolar disorder (*Rule 60(b) Motion,* Ex. 5), and several documents related to alleged spousal abuse by Mr. Moquin, some of which reference Mr. Moquin's alleged bipolar disorder, and which include an Emergency Protective Order from a California proceeding (*Rule 60(b) Motion,* Ex. 6), a Pre-Booking Information Sheet from a California proceeding (*Rule 60(b) Motion,* Ex. 7) and a Request for Domestic Violence Restraining Order, also from a California proceeding (*Rule 60(b) Motion,*

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[5] The *Willard Declaration* includes paragraphs discussing the underlying facts of the action and the initial filing of the suit in California. These paragraphs are not relevant to the Court's determination of the *Rule 60(b) Motion* and are not considered. *See e.g.*, WD ¶¶ 1-51, 100.

Ex. 8). The documents from the California proceedings are not certified by the clerk of the court.

37. Defendants filed their *Opposition to Rule 60(b) Motion Relief* on May 18, 2018 ("*Opposition*").

38. Plaintiffs filed their *Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion* on May 29, 2018 ("*Reply*"). The *Reply* attached eleven (11) new exhibits, including the new *Declaration of Larry J. Willard in Response to Defendants' Opposition to Rule 60(b) Motion for Relief. Reply,* Ex. 1 ("*Reply Willard Declaration*" and "*RWD" for citations*). [6] The *Reply's* exhibits include copies of text messages between Mr. Willard and Mr. Moquin (*Reply,* Ex. 2, 4 and 7), copies of emails between Mr. Willard and his counsel (*Reply, Ex.* 3, 6, 8 and 10), a receipt detailing an alleged payment made by Mr. Willard to Mr. Moquin's doctor on March 13, 2018 (*Reply,* Ex. 5), and a letter from Mr. Williamson to Mr. Moquin dated May 14, 2018 (*Reply,* Ex. 9).

39. On June 6, 2018, Defendants filed their *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply*, arguing this Court should strike Exhibits 1-10 to the *Reply* because: (a) Defendants did not have the opportunity to respond to those exhibits in their *Opposition to the Rule 60(b) Motion*; (b) exhibits contained inadmissible hearsay and/or inadmissible lay opinion testimony; and (c) a number of exhibits were not relevant to this Court's determination of excusable neglect.

40. Defendants' *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply* was fully-briefed and submitted to this Court for decision on June 29,

[6] The Court disregards the paragraphs included in the *Willard Declaration* and the *Reply Willard Declaration* that can be construed to be stated appeal to the Court's sympathy. *See e.g., WD* ¶ 91 -100; *RWD* ¶ 67

2018. Subsequently, Plaintiffs' counsel stipulated to the filing of a sur-reply. No sur-reply was filed by Defendants.

41. In its *Sanctions Order*, the Court made the following findings of fact and conclusions of law, among others: First, Plaintiffs failed to provide damages disclosures and failed to properly disclose an expert witness in violation of this Court's express Orders. *Sanctions Order* ¶¶ 67, 68. Plaintiffs acknowledged their failure to properly disclose an expert witness in accordance with NRCP 16.1(a)(2)(B). *Stipulation and Order*, February 9, 2017. Plaintiffs did not thereafter attempt to properly disclose the expert witness for the entirety of 2017. Plaintiffs failed to comply with multiple orders of this Court. Thereafter, Defendants filed several motions to compel and Plaintiffs' non-compliance forced extension of trial and discovery deadlines on three separate occasions. This Court sanctioned Plaintiffs by ordering payment of Defendants' expenses incurred in filing the *Motion to Compel*.

42. Plaintiffs did not oppose the *Sanctions Motion* despite this Court's express admonitions that the Court was "seriously considering" dismissal.

43. If any of the following Conclusions of Law contain or may be construed to contain Findings of Fact, they are incorporated here and shall be treated as appropriately identified and designated.

CONCLUSIONS OF LAW

Based on the Court's Findings of Fact, the Court makes its Conclusions of Law as follows.

1. If any the foregoing Findings of Fact contain or may be construed to contain Conclusions of Law, they are incorporated here and shall be treated as appropriately identified and designated.

Rule 60(b) Standard

2. Under NRCP 60(b)(1), on motion, this Court may relieve a party from an order or final judgment[7] on grounds of mistake, inadvertence, surprise, or excusable neglect. NRCP 60(b)(1).

3. A party who seeks to set aside an order pursuant to NRCP 60(b)(1) "has the burden to prove mistake, inadvertence, surprise, or excusable neglect by a preponderance of the evidence." *Polivka v. Kuller*, 128 Nev. 926, 381 P.3d 651 (2012) (citations omitted); *see also Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 446, 488 P.2d 911, 915 (1971) ("'[t]he burden of proof on [a motion to set aside under Rule 60(b)] is on the moving party who must establish his position by a preponderance of the evidence.'") (quoting *Luz v. Lopes*, 55 Cal.2d 54, 10 Cal.Rptr. 161, 166, 358 P.2d 289, 294 (1960)).

The Rule 60(b) Motion is not Supported by Competent, Admissible and Substantial Evidence.

4. Plaintiffs' ground asserted to set aside the *Order Granting Defendants' Motion to Strike, Order Granting the Motion for Sanctions, and Sanctions Order*[8] is Mr. Moquin "failed to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Rule 60(b) Motion*, 1.

5. While this Court "has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b)," *Stoecklein v. Johnson Electric,*

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[7] This Court entered its *Order re Request for Entry of Judgment* on June 4, 2018, declining to enter judgment as the Court deemed it appropriate to consider the *Rule 60(b) Motion* on the underlying *Sanctions Order*.

[8] Plaintiffs argue that the *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the *Sanctions Order* did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Rule 60(b) Motion,* 12. This is addressed by the Court hereinafter.

Inc., 109 Nev. 268, 271, 849 P.2d 305, 307 (1993), "this discretion is a legal discretion and cannot be sustained where there is no competent evidence to justify the court's action." *Id.* (emphasis added) (citing *Lukey v. Thomas*, 75 Nev. 20, 22, 333 P.2d 979 (1959)); *see also Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (holding a court abuses its discretion when its decision is not supported by substantial evidence; substantial evidence "defined as that which a reasonable mind might accept as adequate to support a conclusion" (internal quotation marks omitted)).

6. The *Rule 60(b) Motion* purports to provide substantial evidence to support its legal argument through the *Willard Declaration* and the *Reply Willard Declaration* together with the attached exhibits, all of which contain statements and documents that are inadmissible, and in some instances, inadmissible on multiple grounds.

7. The *Willard Declaration* includes several statements about Mr. Moquin's alleged mental disorder. As set forth in the Findings of Fact, *supra,* Mr. Willard declares he is "convinced" Mr. Moquin was dealing with issues and demons beyond his control (*WD* ¶ 66); he "learned" Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work (WD ¶ 67; *RWD* ¶ 15); Mr. Moquin suffered a "total mental breakdown" (*WD* ¶ 68; *RWD* ¶16); Mr. Moquin explained to Mr. Willard he had been diagnosed with bipolar disorder (*WD* ¶ 70; *RWD* ¶ 37); Mr. Willard believes Mr. Moquin's disorder to be "severe and debilitating" (*WD* ¶ 73); Mr. Willard now sees "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on

the case (*WD* ¶ 76); and, Mr. Willard can now see how Mr. Moquin's alleged psychological issues affected his case (*WD* ¶ 87).[9]

8. The *Willard Declaration* addresses Mr. Moquin's private life, including his personal mental status and the conflict in his marriage.

9. Mr. Willard statements are not all based on his own perceptions.

10. It logically follows, based on the subject matter, Mr. Willard could not have credibly obtained this information by observing it.

11. Mr. Willard lacks personal knowledge to testify to the assertions included in the *Willard Declaration* and the *Reply Willard Declaration* regarding Mr. Moquin's mental disorder, private personal life, and private marital conflicts.

12. It further logically follows, Mr. Willard could only have obtained this information by communication from Mr. Moquin (or Mr. Moquin's wife), although he does not overtly state this.

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[9] The *Willard Declaration and the Reply Willard Declaration* contain many nearly identical statements. They compare as follows:

***Willlard Declaration* Paragraph**	***Reply Willard Declaration* Paragraph**
53	7
54	8
59	9
63	11
64	12 (slightly differs)
65	13
67	15
68	16
69	35
70	38
71	39
82	10 (Similar - not exact)
89	3
91	67

13. The *Willard Declaration* and *Reply Willard Declaration* include inadmissible hearsay and under NRS 51.035 and 51.065. *See Agnello v. Walker*, 306 S.W.3d 666, 675 (Mo. App. 2010), as modified, (Apr. 27, 2018) (hearsay testimony or documentation cannot serve as the evidence necessary to meet movant's burden of persuasion to set aside judgment under Rule 60); *New Image Indus. v. Rice,* 603 So.2d 895, 897 (Ala. 1992) (affirming trial court's refusal to grant Rule 60 relief where the only evidence of excusable neglect was an affidavit containing inadmissible hearsay and speculation).

14. Separate and apart from the challenge to the *Willard Declaration* and the *Reply Willard Declaration* on hearsay grounds, Mr. Willard's statements are also speculative and therefore inadmissible. He does not declare he personally observed Mr. Moquin's alleged condition until he draws this unqualified conclusion late in the case, and, even if he had, he speculates what the mental disorder could cause and caused, offering an internet article to boost his credibility, which is also hearsay with no applicable exception offered.

15. The assertion describing Mr. Moquin's statement to Mr. Willard that Dr. Mar diagnosed Mr. Moquin with bipolar disorder (*WD* ¶ 69; *RWD* ¶35) is inadmissible hearsay with no exception under NRS 51.105(1) because the Mr. Willard's declaration does not constitute Mr. Moquin's declaration of "then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health." Instead, Dr. Mar, purportedly diagnosed Mr. Moquin; Mr. Moquin told Mr. Willard of Dr. Mar's purported diagnosis; and Mr. Willard makes the statement of Mr. Moquin's diagnosis. The statements were not spontaneous and instead were a basis for Mr. Moquin to request monetary assistance.

16. Even if it is construed that Mr. Moquin's report of Dr. Mar's diagnosis constituted Mr. Moquin's statement of then existing mental condition. Mr. Willard's statements are not admissible as contemporaneous statements Mr. Moquin made about his own present physical symptoms or feelings. *See* 2 McCormick on Evid. §273 (7th ed.) ("[s]tatements of the declarant's present bodily condition and symptoms, including pain and other feelings, offered to prove the truth of the statements, have been generally recognized as an exception to the hearsay rule. Special reliability is provided by the spontaneous quality of the declarations, assured by the requirement that the declaration purport to describe a condition presently existing at the time of the statement."). No spontaneous statement of Mr. Moquin, as the declarant, were offered.

17. The *Willard Declaration* and the *Reply Willard Declaration* also contains hearsay within hearsay, which is inadmissible under NRS 51.067.

18. Mr. Willard also purports to declare Mr. Moquin had a complete mental breakdown, how Mr. Moquin's symptoms of his alleged bipolar disorder might manifest, and how those symptoms may have affected Mr. Moquin's work. *WD* ¶¶ 68, 73-76 and 87-88; *RWD* ¶ 16, 38.

19. These statements are inadmissible as impermissible lay opinion under NRS 50.265. Mr. Willard is not a licensed health care provider qualified to opine on Mr. Moquin's mental condition, mental disorder, or symptoms of any disorder or condition that manifested.

20. Mr. Willard surmises, speculates and draws conclusions. He is not qualified to testify about what medical, physical, or mental condition Mr. Moquin may have, or the effect of that condition on his work. *White v. Corn*, 616 S.E.2d 49, 54, 46 Va. App. 123, 134 (2005) ("While lay witnesses may testify to the attitude and demeanor

of the defendant, lay witnesses cannot express an opinion as to the existence of a particular mental disease or condition.") (Citations omitted).

21. Plaintiffs contend Mr. Willard's opinions of how Mr. Moquin's alleged condition might manifest with symptoms and how those symptoms may have affected Mr. Moquin's work are appropriate because "lay witnesses can offer testimony as to a person's sanity." *Reply*, 2. Plaintiffs cite *Criswell v. State*, 84 Nev. 459, 464, 443 P.2d 552, 555 (1968) for the proposition that lay witnesses can offer testimony as to a person's sanity. However, *Criswell* was overruled in 2001. *See Finger v. State*, 117 Nev. 548, 576-77, 27 P.3d 66, 85 (2001) (en banc decision regarding the legal insanity defense and statutorily created "guilty, but mentally ill plea" and holding the legislative abolishment of insanity as a complete defense to a criminal offense unconstitutional, among other holdings, including that lay witnesses cannot testify as to "insanity" because the term has a precise and narrow definition under Nevada law).

22. The Court concludes the *Finger* holdings are not applicable here. First, the *Finger* case involves a defense to criminal charges. Second, Mr. Willard did not testify that Mr. Moquin was sane or insane; he testified about the diagnosis of bipolar disorder, possible symptoms of bipolar disorder and how those symptoms, if present, might have affected Mr. Moquin's work.

23. The Nevada Revised Statutes (Evidence Code) provides:

> A lay witness may testify to opinions or inferences that are "[r]ationally based on the perception of the witness; and ... [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265. A qualified expert may testify to matters within their "special knowledge, skill, experience, training or education" when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.

NRS 50.275; *Burnside v. State,* 131 Nev. Adv. Op. 40, ___, 352 P.3d 627, 636 (death penalty case detective allowed to testify about cell phone records as lay witness). Further,

> [t]he key to determining whether testimony constitutes lay or expert testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience? *See Randolph v. Collectramatic, Inc.,* 590 F.2d 844, 846 (10th Cir.1979) (observing that lay witness may not express opinion "as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness"); Fed.R.Evid. 701 advisory committee's note (2000 amend.) ("[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." (internal quotation marks omitted)); *State v. Tierney,* 150 N.H. 339, 839 A.2d 38, 46 (2003) ("Lay testimony must be confined to personal observations that any layperson would be capable of making.").

Id.

24. While the Nevada Supreme Court and Court of Appeals have not addressed lay witness testimony, such as that contained in the *Willard Declaration* and *Reply Willard Declaration,* regarding bipolar disorder, this has been specifically addressed by the Pennsylvania court and is persuasive here. In the case of *In re Petition for Involuntary Commitment of Joseph R. Barbour,* the Superior Court of Pennsylvania held, "Lay witness and non-expert could not provide expert testimony regarding involuntary committee's medical diagnosis, specifically the existence of mood disorder known as bipolar disorder." *In re Petition for Involuntary Commitment of Joseph R. Barbour,* 733 A.2d 1286 (PA. 1999). This Court therefore concludes such testimony is inadmissible to support the *Rule 60(b) Motion.*

25. The documents attached as Exhibits 6, 7 and 8 to the *Rule 60(b) Motion*, which purport to detail Mr. Moquin's alleged domestic abuse of his family, and which also contain statements about Mr. Moquin's alleged bipolar condition, are inadmissible as discussed, *supra*, with regard to bipolar disorder.

26. Exhibits 6, 7 and 8 to the *Rule 60(b) Motion* are not, and cannot be, authenticated by Mr. Willard. Mr. Willard is not the author of the documents and has no personal knowledge of their authenticity. He therefore cannot authenticate or identify the documents pursuant to NRS 52.015(1) or NRS 52.025.

27. Exhibits 6, 7 and 8 do not meet the requirements for presumed authenticity under NRS 52.125, as the exhibits are not certified copies of public records.

28. Pursuant to NRS 47.150, a judge or court may take judicial notice, whether requested to or not. Further, a judge or court shall take judicial notice if requested by a party and supplied with the necessary information. NRS 47.150. Here, no party requested this Court to take judicial notice of the California court records contained in the exhibits Exhibit 6 to the *Rule 60(b) Motion* and the *Reply* based on certified copies. The Court exercises its discretion and declines to take judicial notice here.

29. Moreover, even if Exhibits 6, 7 and 8 could be authenticated, the statements contained in those exhibits regarding Mr. Moquin's alleged mental disorder and condition, are inadmissible lay opinion about bipolar disorder and would still be inadmissible hearsay, as they were apparently authored by Mr. Moquin's wife, and Plaintiffs are offering them to prove that Mr. Moquin suffers from bipolar disorder and his life was in "shambles."

30. A number of *Reply* Exhibits and discussed in *Reply Willard Declaration* also contain inadmissible hearsay.

31. All of the texts and emails offered by Plaintiffs and authored by Mr. Moquin or Mr. O'Mara constitute inadmissible hearsay under NRS 51.035 and 51.065.

32. Specifically, Exhibit 2 and 3 to the *Reply*, the text messages authored by Mr. Moquin in Exhibit 4, the text messages authored by Mr. Moquin in Exhibit 7, the email authored by Mr. Moquin in Exhibit 8, and the emails authored by Mr. Moquin in Exhibit 10 are therefore disregarded as inadmissible hearsay.

33. Exhibits attached to the *Reply* also contain communications occurring after this Court issued its *Order Granting Motion to Strike* and its *Order Granting Sanctions*.

34. All of statements in the *Reply Willard Declaration* set forth after Paragraph 37 detail events and communications from late January, 2018 through late May, 2018, all of which occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order*. *Willard Declaration* ¶¶ 37-67.

35. Exhibits 5, 6, 7, 8, 9, and 10 to the *Reply* contain only communications and descriptions of events that occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order*.

36. Logically, relevant events asserted to support Plaintiffs' argument of excusable neglect must have necessarily occurred prior to the entry of the orders Plaintiffs seek to set aside.

37. Statements in the *Reply Willard Declaration* after Paragraph 37 and Exhibits 5, 6, 7, 8, 9, and10 to the *Reply* are not relevant to this Court's determination of

whether Plaintiffs have met their burden of proving excusable neglect under NRCP 60(b).

38. Competent and substantial evidence has not been presented to establish *Rule 60(b) Relief.*

Notwithstanding Plaintiff's Lack of Admissible Evidence, Plaintiffs Fail to Meet their Burden under Rule 60(b) to Set Aside the *Sanctions Order* and *Order Granting Motion to Strike.*

39. Under Nevada law, "'clients must be held accountable for the acts and omissions of their attorneys.'" *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 204, 322 P.3d 429, 433 (2014) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-97, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). The client "'voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts of omissions of this freely selected agent.'" *Huckabay Props.*, 130 Nev. at 204, 322 P.3d at 433 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (rejecting the argument that petitioner's claim should not have been dismissed based on counsel's unexcused conduct because petitioner voluntarily chose his attorney).

40. In *Huckabay Props.*, the Nevada Supreme Court dismissed an appeal where appellant's counsel failed to file an opening brief following two granted extensions and a court order granting appellants a final extension. *Huckabay Props.*, 130 Nev. 209, 322 P.3d at 437. In *Huckabay Props.*, the appellant was represented by

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two attorneys. In dismissing the appeal, and applicable to civil litigation at the trial court level here, the Court held:

> Nevada's jurisprudence expresses a policy preference for merits-based resolution of appeals, and our appellate procedure rules embody this policy, among others, litigants should not read the rules or any of this court's decisions as endorsing noncompliance with court rules and directives, as to do so risks forfeiting appellate relief. In these appeals, appellants failed to timely file the opening brief and appendix after having been warned that failure to do so could result in the appeals' dismissals. Appellants actually had two attorneys who received copies of this court's notices and orders regarding the briefing deadline, but they nevertheless failed to comply with briefing deadlines and court rules and orders . . . and an appeal may be dismissed for failure to comply with court rules and orders and still be consistent with the court's preference for deciding cases on their merits, as that policy must be balanced against other policies, including the public's interest in an expeditious appellate process, the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administration considerations, such as case and docket management. As for declining to dismiss the appeal because the dilatory conduct was occasioned by counsel, and not the client, that reasoning does not comport with general agency principles, under which a client is bound by its civil attorney's actions or inactions.

Huckabay Props. v. NC Auto Parts, 130 Nev. at 209, 322 P.3d at 437.

41. In *Huckabay Props.,* however, the court recognized exceptional circumstances providing two possible exceptions "to the general agency rule that the 'sins' of the lawyer are visited upon his client where the lawyer's addictive disorder and abandonment of his legal practice or criminal conduct justified relief for the victimized client." *Id.* at 204 n.4, 322 P.3d at 434 n.4 (citing *Passarelli*, 102 Nev. at 286). Notably, these exceptions noted by the court in *Huckabay Props.* are not present here, as the facts of *Pasarelli* are readily distinguishable.

42. First, in *Passarelli*, the record included evidence the attorney suffered from a substance abuse disorder that resulted in missed office days and appointments and an inability to function. *Passarelli*, 102 Nev. at 285. Second, the attorney voluntarily

closed his law practice. *Id.* Third, the attorney was placed on disability inactive status by the Nevada Bar. *Id.* Finally, the client in *Passarelli* had only one attorney. *Id.*

43. None of these facts are present in this case. As concluded, *supra*, no competent, reliable and admissible evidence of Mr. Moquin's claimed mental disorder is before this Court. Further, there is no evidence of missed meetings or absences from office due to the claimed conditions. There is no evidence that Mr. Moquin closed his law practice.

44. Mr. Moquin is on active status with the California Bar. *Opposition to Rule 60(b) Motion*, Ex. 5; *Attorney Search, The State Bar of California, http://members.calbar.ca.gov/fal/LicenseeSearch* (last visited Nov. 30, 2018).

45. Pursuant to NRS 47.150, the Court may take judicial notice, whether requested or not. A fact subject to judicial notice must be either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. NRS 47.130. It follows that the State Bar of California provides accurate information regarding licensing of attorneys which cannot be reasonably questioned. The Court takes judicial notice of Mr. Moquin's active status.

46. Applied here, the *Huckabay Props./Passarelli* analysis compels denial of the *Rule 60(b) Motion*. The standard for "excusable neglect" based on activities of a party's attorney requires the attorney be completely unable to respond or appear in the proceedings. *See Passarelli*, 102 Nev. at 285 (court found excusable neglect where attorney failed to attend trial due to psychiatric disorder which caused him to shut down his practice and was placed on disability inactive status by the State Bar of Nevada); *see also Cicerchia v. Cicerchia*, 77 Nev. 158, 160-61, 360 P.2d 839, 841 (1961) (court

found excusable neglect where respondent lived out of state and suffered a nervous breakdown shortly after retaining out of state counsel, who was unaware and uninformed of the time to appear).

47. Here, Plaintiffs' attorneys did not completely abandon the case. Rather, the Nevada Rules of Civil Procedure, this Court's express orders, and Defendants' requests for damages computations and expert disclosures were ignored. Further, this Court granted, upon was also ignored.

48. Plaintiffs attempt to excuse this conduct in their *Rule 60(b) Motion* by claiming Mr. Moquin had suffered a complete mental breakdown and his personal life was "in shambles." In addition, to the preclusion of evidence discussed, *supra*, the evidence is vague at best regarding these assertions and vague regarding if, and when, Mr. Moquin's alleged disorder impaired him and are vague in asserting when any of the alleged events took place. Plaintiffs do attach additional exhibits to their *Reply* that offer some information on timing but are inadequate for the Court's determination.

49. Specifically, Exhibit 2 to the *Reply* appears to be a text string between Mr. Willard and Mr. Moquin from December 2, 2017 through December 6, 2017, in which Mr. Willard inquires about the status of Plaintiffs' filing in response to the *Motion for Sanctions*. *Reply*, Ex. 2. The text messages reflect Mr. Willard was aware of the initial deadline, December 4, 2017, for Plaintiffs to respond to the *Motion for Sanctions* (based on the November 15, 2017 filing date and electronic service).

50. Defendants agreed to extensions through 3:00 pm on December 6, 2017 for Plaintiffs to file their oppositions.

51. The Court granted an additional extension through December 18, 2018.

52. Plaintiffs had knowledge of the initial filing deadline. They were aware no opposition papers were filed. Mr. Willard continued to communicate with both Mr. Moquin and Mr. O'Mara from December 11 until December 25, 2017 regarding the delinquent filings (*Reply*, Ex. 3, 4), well after this Court's final filing deadline of December 18, 2017. *Sanctions Order* ¶ 95.

53. Despite knowing no oppositions had been filed, neither Mr. Willard (through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or this Court to address the status of this case. *Sanctions Order* ¶ 98.

54. Plaintiffs did nothing to apprise this Court of any issues until they filed the *Rule 60(b) Motion*.

55. Plaintiffs started looking for attorneys who might be able to help. *Reply Willard Declaration* ¶ 36. Plaintiffs instead provided personal financial assistance to Mr. Moquin and did not terminate his services. *WD* ¶ 71; *RWD* ¶ 39.

56. Plaintiffs knew timely oppositions were not filed.

57. Plaintiffs chose to retain Mr. Moquin and did not terminate his representation, even after becoming aware that he did not file a timely response to the *Motion for Sanctions*. Plaintiffs cannot now avoid the consequences of the acts of omissions of their freely selected agent.

58. Plaintiffs voluntarily chose to stop seeking new counsel to assist and chose to continue to rely on Mr. Moquin solely for financial reasons. *Willard Declaration* ¶ 81.

59. Plaintiffs' multiple instances of non-compliance, including the Plaintiffs failure to provide a compliant damages disclosure in this action, is reflected in the court file for this proceeding, occurring well before Mr. Moquin's purported breakdown in

December, 2017 or January, 2018 asserted as preventing him from opposing the motions.

60. Mr. O'Mara was counsel of record and did not report any issues related to Mr. Moquin to this Court until the filing of his *Notice* in March. *Notice, 1.*

61. The Court gave counsel notice of the seriousness of Plaintiffs' violations and expressed it was considering dismissal based on those violations. *Opposition to Rule 60(b) Motion*. Ex. 3, December 12, 2017 Transcript ("you need to know going into these oppositions, that I'm very seriously considering granting all of it . . . I haven't decided it, but I need to see compelling opposition not to grant it."). Plaintiffs and their attorneys were given notice of the potential consequence of failing to file an opposition to the *Sanctions Motion*.

62. Mr. Moquin did not abandon Plaintiffs. He appeared at status hearings, participated in depositions, filed motions and other papers, including a lengthy opposition to Defendants' motion for partial summary judgment. Mr. Moquin participated in oral arguments and filed two summary judgment motions with substantial supporting exhibits and detailed declarations.

63. A party "cannot be relieved from a judgment [order] taken against him in consequence of the neglect, carelessness, forgetfulness, or inattention of his attorney," *Cicerchia*, 77 Nev. at 161.

Plaintiffs Knew of Mr. Moquin's Alleged Condition and Alleged Non-responsiveness prior to the *Sanctions Order* and did Nothing and, therefore, Cannot Establish Excusable Neglect.

64. In the *Willard Declaration* and *Reply Willard Declaration,* Mr. Willard admits he knew Mr. Moquin was having personal financial difficulties and that he borrowed money from friends and family to fund Mr. Moquin's personal expenses. *WD*

¶¶ 63-65; *RWD* ¶ 11-13. Mr. Willard also admits that he recommended a psychiatrist to Mr. Moquin and he again borrowed money from a friend to pay for Mr. Moquin's treatment. *WD* ¶¶ 68-71; *RWD* ¶ 11-13. Mr. Willard was aware of Mr. Moquin's alleged problems prior to this Court's *Order Granting Motion to Strike and Sanctions Order*, yet continued to allow Mr. Moquin to represent Plaintiffs.

65. Mr. Willard was aware of Mr. Moquin's inaction which distinguishes this case from the cases upon which Plaintiffs rely in the *Rule 60(b) Motion*, where the parties were unaware of their attorneys' problems. *See e.g., Passarelli*, 102 Nev. at 286 ("Passarelli was effectually and unknowingly deprived of legal representation") (emphasis added); *U.S. v. Cirami*, 563 F.2d 26, 29-31 (2d Cir. 1977) (client discovered that attorney had a mental disorder that prevented him from opposing summary judgment more than two years later); *Boehner v. Heise*, 2009 WL 1360975 at *2 (S.D.N.Y. 2009) (client did not learn case had been dismissed or and did not learn of attorney's mental condition until several months after dismissal). Here, Mr. Willard knew of the actions that supported the *Sanctions Order*.

66. Mr. Willard admits he was informed by Mr. O'Mara prior to the dismissal of the Plaintiffs' claims that Mr. Moquin was not responsive. Plaintiffs failed to replace Mr. Moquin or take other action due to perceived financial reasons. *Willard Declaration* ¶81. Plaintiffs' knowledge and inaction vitiates excuse for neglect.

67. The *Rule 60(b) Motion* cites authority for the proposition that even "where an attorney's mishandling of a movant's case stems from the attorney's mental illness," which might justify relief under Rule 60(b). However, "client diligence must still be shown." *Cobos v. Adelphi Univ.*, 179 F.R.D. 381, 388 (E.D.N.Y. 1998); see also *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 357 (5th Cir. 1993) ("A party has a

duty of diligence to inquire about the status of a case...."); *Pryor v. U.S. Postal Service*, 769 F.2d 281, 287 (5th Cir. 1985) ("This Court has pointedly announced that a party has a duty of diligence to inquire about the status of a case....").

68. Mr. Willard's claim that he had no choice but to continue working with Mr. Moquin due to financial issues lacks credibility as he admits he was able to borrow money to fund Mr. Moquin's personal life and medical treatment. It logically follows he had resources to retain new attorneys at the time.

69. Plaintiffs have not established by substantial evidence that they exercise diligence to rectify representation in their case despite ample knowledge of Mr. Moquin's non-responsiveness.

The *Rule 60(b) Motion* should be Denied because Two Attorneys Represented Plaintiffs had an Obligation to Ensure Compliance with the Nevada Rules of Civil Procedure and this Court's Orders.

70. Plaintiffs' *Rule 60(b) Motion* ignores the fact David O'Mara served as local counsel. In Nevada, the responsibilities of local counsel are clearly defined, and encompass active responsibility to represent the client and manage the case:

> (a) The Nevada attorney of record shall be responsible for and actively participate in the representation of a client in any proceeding that is subject to this rule.
> (b) The Nevada attorney of record shall be present at all motions, pre-trials, or any matters in open court unless otherwise ordered by the court.
> (c) The Nevada attorney of record shall be responsible to the court...for the administration of any proceeding that is subject to this rule and for compliance with all state and local rules of practice. It is the responsibility of Nevada counsel to ensure that the proceeding is tried and managed in accordance with all applicable Nevada procedural and ethical rules.

SCR 42(14). Mr. O'Mara's representation, even if contractually limited, was governed by this rule.

71. Mr. O'Mara expressly "consent[ed] as Nevada Counsel of Record to the designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his *Motion to Associate Counsel. Motion to Associate Counsel.*

72. Mr. O'Mara attended every hearing and court conference in this case. And, among other things, Mr. O'Mara signed the Verified Complaint and the First Amended Verified Complaint. *Complaint*; *FAC.*

73. WDCR 23(1) provides:

> Counsel who has appeared for any party shall represent that party in the case and shall be recognized by the court and by all parties as having control of the client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing office, in accordance with SCR 46 and this rule.

WDCR 23.

74. Mr. O'Mara was the sole signatory on Plaintiffs' deficient initial disclosures, (*Opposition to Rule 60(b) Motion,* Ex. 6), the uncured deficiencies of which were a basis for sanction of dismissal. *Sanctions Order.*

75. Mr. O'Mara also signed and filed the *Brief Extension Request* with this Court representing,

> Counsel has been diligently working for weeks to respond to Defendant's serial motions, which include seeking dismissal of Plaintiffs' case. With the full intention of submitting said responses, Counsel for Plaintiffs encountered unforeseen computer issues.... Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and submit the oppositions to Defendants' three motions.

Brief Extension Request.

76. Mr. O'Mara's involvement precludes a conclusion of excusable neglect here.

The *Sanctions Order* was Sufficient under Nevada Law

77. Plaintiffs assert that the *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the *Sanctions Order* did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Rule 60(b) Motion* at 12. However, consideration of this factor is discretionary, not mandatory. See *Young v. Johnny Ribeiro*, 106 Nev. at 93 ("The factors a court **may** properly consider include . . . whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney") (emphasis supplied).

78. The Court concludes factors enumerated in *Young v. Johnny Ribeiro Bldg., Inc.* were met by the *Sanctions Order*. Specifically, the Nevada Supreme Court held where a court issues an order of dismissal with prejudice as a discovery sanction a court may consider, among others, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, and the feasibility and fairness of alternative, less severe sanctions. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. at 93. The factors are not mandatory so long as the Court supports the order with "an express, careful and preferably written explanation of the court's analysis of the pertinent factors." *Id.*

79. While each suggested factor discussion in the *Sanctions Order* was not labeled by factor, the Court addressed the factors it deemed appropriate.

80. In light of the circumstances in this case, the dismissal of Plaintiffs' claims did not unfairly penalize Plaintiffs based on the factors analyzed in the *Sanctions Order*.

80.

81. Plaintiffs assert this Court must address the additional factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). *Yochum* involves relief from a default judgment and not an order, as here, where judgment has not been entered. *Yochum* does not preclude denial of the motion.

The *Rule 60(b) Motion* should be Denied.

82. After weighing the credibility and admissibility of the evidence provided in support of the *Rule 60(b) Motion,* substantial evidence has not been presented to establish excusable neglect.

83. Plaintiffs have failed to meet their burden of proving, by a preponderance of the evidence, excusable neglect so as to justify relief under NRCP 60(b).

ORDER

Based upon the foregoing, Plaintiffs' *Rule 60(b) Motion* is **DENIED**, in its entirety.

DATED this 31th day of November, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 30 day of November, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

RICHARD WILLIAMSON, ESQ.

JONATHAN TEW, ESQ.

BRIAN IRVINE, ESQ.

ANJALI WEBSTER, ESQ.

JOHN DESMOND, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

F I L E D
Electronically
CV14-01712
2018-12-03 11:17:39 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7002654

2540

DICKINSON WRIGHT, PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (775) 786-0131
Email: Jdesmond@dickinsonwright.com
Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

Attorney for Berry Hinckley Industries and Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;

Defendants.
_____/

CASE NO. CV14-01712

DEPT. 6

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.

_____/

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on November 30, 2018, an Order was entered in the above-captioned matter denying Plaintiffs' Rule 60(b) Motion for Relief. A true and correct copy of the order is attached hereto as **Exhibit 1.**

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 3rd day of December, 2018.

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (775) 786-0131
Email: Jdesmond@dickinsonwright.com
Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached **NOTICE OF ENTRY OF ORDER** on the parties through the Second Judicial District Court's E-Flex filing system to the following:

Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Attorneys for Plaintiffs/Counterdefendants

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
3287 Ruffino Lane
San Jose, California 95148

DATED this 3rd day of December, 2018.

/s/ Mina Reel
An employee of DICKINSON WRIGHT PLLC

EXHIBIT TABLE

Exhibit	Description	Pages[1]
1	November 30, 2018, Order	32

[1] Exhibit page counts are exclusive of exhibit slip sheets.

F I L E D
Electronically
CV14-01712
2018-12-03 11:17:39 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7002654

EXHIBIT 1

EXHIBIT 1

FILED
Electronically
CV14-01712
2018-11-30 04:08:13 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7001598

Code:

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;

Defendants.
_____/

CASE NO. CV14-01712

DEPT. 6

ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants[1].
_____/

[1] On April 13, 2018, this Court entered its *Order of Dismissal of Claims of Wooley Plaintiffs with Prejudice*. On the same date, this Court entered its *Order Granting Defendants/ Counterclaimants' Motion to Dismiss Counterclaims*. All counterclaims were dismissed by said Order.

ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

Before this Court is Plaintiffs' Rule 60(b) Motion for Relief ("*Rule 60(b) Motion*") filed by PLAINTIFFS LARRY J. WILLARD, INDIVIDUALLY AND AS TRUSTEE OF THE LARRY JAMES WILLARD TRUST FUND AND OVERLAND DEVELOPMENT CORPORATION, A CALIFORNIA CORPORATION (collectively, "Willard" or the "Plaintiffs"), by and through counsel, Robertson, Johnson, Miller & Williamson.[2] By their *Rule 60(b) Motion*, Plaintiffs seek, pursuant to NRCP 60(b), to set aside: (a) this Court's January 4, 2018, *Order Granting Defendants/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich*; (b) this Court's January 4, 2018, *Order Granting Defendants' Motion for Sanctions*; and (c) this Court's March 6, 2018, *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions*.

Thereafter, DEFENDANTS BERRY-HINCKLEY INDUSTRIES ("BHI") AND JERRY HERBST (collectively, "Defendants"), filed their *Opposition to Rule 60(b) Motion for Relief,* by and through their counsel, Dickinson Wright, PLLC.

Plaintiffs then filed their *Reply in Support of the Willard Plaintiffs Rule 60(b) Motion for Relief* and the parties set the matter for hearing.

This Court carefully considered the papers submitted, the arguments of counsel, the entire court file herein, and is fully advised in the premises, and enters its order as follows.

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[2] Plaintiffs' former local counsel was David O'Mara of the O'Mara Law Firm, P.C. Mr. O'Mara filed a *Notice of Withdrawal of Local Counsel ("Notice"), on March 15, 2018.* Brian Moquin remains counsel of record as he has not withdrawn; however, he is not indicated as counsel filing the *Rule 60(b) Motion.*

FINDINGS OF FACT

The Court makes the following Findings of Fact:

Plaintiffs' Complaint

1. On August 8, 2014, Plaintiffs commenced this action by filing their *Complaint* against Defendants.[3] *Complaint*, generally.

2. By way of their *Complaint* and subsequent *First Amended Complaint,* Plaintiffs sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for $19,443,836.94, discounted by 4% per the lease to $15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. *First Amended Complaint* ("*FAC*"), generally.

3. Willard also sought several other categories of damages which have since been dismissed or withdrawn. May 30, 2017, *Order.*

Plaintiffs' Failure to Comply with the Nevada Rules of Civil Procedure and this Court's Orders

4. Plaintiffs failed to provide a compliant damages disclosure in this action.

5. Plaintiffs failed to provide a damages computation in their initial disclosures, as required under NRCP 16.1(a)(1)(C). *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* ("*Sanctions Order*") ¶ 12, and failed to provide damages computations at any time despite numerous demands on both Mr. Moquin and Mr. O'Mara. *Sanctions Order* ¶¶ 14-16, 25, 27-33, 39, 43-44 and 51-54.

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[3] Willard filed the initial complaint jointly with Edward E. Wooley and Judith A. Wooley, individually and as Trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). However, Defendants and Wooley entered into a settlement agreement and stipulation for dismissal. This Court entered its Order on April 13, 2018 dismissing Wooley's claims with prejudice.

6. Plaintiffs failed to provide complete and adequate responses to interrogatories requesting information about Plaintiffs' damages in the normal course of discovery.

7. Plaintiffs failed to provide complete and adequate responses to interrogatories in violation of this Court's *Order Granting Defendants' Motion to Compel* and failed to comply with this Court's *Order* ("*January Hearing Order*") issued after the parties discussed Plaintiffs' failure to provide damages computations at the January 10, 2017 hearing attended by Mr. Moquin, Mr. O'Mara and Mr. Willard. *Sanctions Order* ¶¶ 17-25.

8. The *January Hearing Order* required Plaintiffs to provide damages computations and supporting materials. *Sanctions Order* ¶¶ 46-49, 54, 59-64 and 67-68; *Defendants' Opposition Plaintiffs' Rule 60(b) Motion*, Ex. 2, *Transcript* of January 10, 2017 Hearing at pp. 61-63 and 68; *January Hearing Order.*

9. Plaintiffs failed to properly disclose Daniel Gluhaich as an expert witness as required by NRCP 16.1(a)(2). *Sanctions Order* ¶¶ 34-37.

10. In contravention of this Court's *January Hearing Order*, Plaintiffs failed to provide an amended disclosure of Mr. Gluhaich, although Defendants' counsel made multiple requests. *Sanctions Order* ¶¶ 38-45, ¶¶ 50-64.

Plaintiffs' Summary Judgment Motion

11. Pursuant to the February 9, 2017, *Stipulation and Order to Continue Trial,* discovery closed in mid-November, 2017.

12. On October 18, 2017, less than a month before the close of discovery, Plaintiffs filed their *Motion for Summary Judgment* asserting they were entitled, as a

matter of law, to more than triple the amount of damages alleged in and requested by their *First Amended Complaint*. *Sanctions Order* ¶¶ 69 and 73.

13. The damages asserted in Plaintiffs' *Motion for Summary Judgment* were not previously disclosed. The motion was also supported by previously undisclosed expert opinions and documents. *Sanctions Order* ¶¶ 74-79.

14. On November 13, 2017, Defendants filed their Opposition to Plaintiffs' *Motion for Summary Judgment*.

15. Plaintiffs' did not submit the *Motion for Summary Judgment* for decision.

Defendants' *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* and *Motion for Sanctions*

16. On November 14, 2017, Defendants filed their *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("*Motion to Strike*").

17. In the *Motion to Strike*, Defendants maintained this Court should preclude Plaintiffs from offering Mr. Gluhaich's testimony on the grounds: (a) Plaintiffs failed to adequately disclose Mr. Gluhaich as an expert because they failed to provide "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B); (b) the opinions offered by Mr. Gluhaich in support of Plaintiffs' *Motion for Summary Judgment* were based upon inadmissible hearsay and were based solely on the opinions of others; and (c) Mr. Gluhaich was not qualified to offer the opinions included in his Declaration attached to and filed in support of Plaintiffs' *Motion for Summary Judgment*.

18. On November 15, 2017, Defendants filed their *Motion for Sanctions ("Sanctions Motion")*.

19. In the *Sanctions Motion*, Defendants argued this Court should sanction Plaintiffs for their continued and intentional conduct in failing to comply with the Nevada Rules of Civil Procedure and this Court's orders requiring Plaintiffs to provide damages computations and full and adequate expert disclosures, and dismiss Plaintiffs' claims with prejudice, or, in the alternative, preclude Plaintiffs from seeking new damages or relying upon their undisclosed expert and appraisals.

20. Defendants agreed to give Plaintiffs' several extensions of time to oppose the *Motion to Strike* and *Sanctions Motion*, but no oppositions were filed.

21. On December 6, 2017, Plaintiffs requested relief from the Court by extension to respond until "December 7, 2017 at 4:29 p.m." *Sanctions Order* ¶ 94; *Plaintiffs' Request for a Brief Extension of Time ("Brief Extension Request"),* generally.

22. This Court held a status conference on December 12, 2017, attended by Defendants' counsel and Plaintiffs' counsel, Mr. Moquin and Mr. O'Mara. At the status conference, after observing Mr. Moquin, having significant dialog with Mr. Moquin, and over vehement objection by the Defendants' counsel, this Court granted *Plaintiffs' Brief Extension Request* plus granted more time than that requested. The Court directed Plaintiffs to respond to the outstanding motions no later than Monday, December 18, 2017, at 10:00 am. *Sanctions Order* ¶ 95.

23. Tis Court further directed Defendants to file their reply briefs no later than January 8, 2018. The Court set the parties' outstanding Motions for oral argument on January 12, 2018. *Sanctions Order* ¶ 96.

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24. This Court admonished Plaintiffs, stating "you need to know going into these oppositions, that I'm very seriously considering granting all of it . . . I haven't decided it, but I need to see compelling opposition not to grant it." *Opposition to Rule 60(b) Motion*, Ex. 3, December 12, 2017, *Transcript of Status Conference*, in part.

25. Plaintiffs did not file an opposition or response to the *Motion to Strike* or *Motion for Sanctions* by December 18, 2017 or any time thereafter, nor did Plaintiffs request any further extension.

26. This Court entered its *Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* on January 4, 2018 ("*Order Granting Motion to Strike*").

27. This Court entered its *Order Granting Defendants'/Counterclaimants' Motion for Sanctions* on January 4, 2018 ("*Order Granting Sanctions*").

28. This Court entered its *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* on March 6, 2018. ("*Sanctions Order*")[4]

Withdrawal of Local Counsel

29. Mr. O'Mara's *Notice of Withdrawal of Local Counsel, ("Notice")* filed March 15, 2018, states, "Mr. Moquin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such a response." *Notice,* 1.

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[4] The *Order Granting Sanctions* ordered sanctions and directed Defendants to "submit a Proposed Order granting *Defendants'/Counterclaimants' Motion for Sanctions*, including factual and legal analysis and discussion, to Department 6 within twenty (20) days of the date of this *Order* in accordance with WDCR 9." *Order Granting Sanctions, 4.* For purposes of the instant motion, the Court considers the *Order Granting Sanctions* and *Sanctions Order*, as one for purposes of the analysis herein.

30. The *Notice* describes the terms of retention of Mr. O'Mara as, "Undersigned Counsel was retained solely as local counsel, and provided Mr. Moquin with the necessary information related to the Court's filing requirement and timelines. Undersigned Counsel was retained only to provide services as directed by Mr. Moquin, and would be relieved of services if Mr. Moquin was removed." *Notice*, 1.

Plaintiffs' *Rule 60(b) Motion*

31. On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a notice of appearance on behalf of Plaintiffs.

32. On April 18, 2018, Plaintiffs filed the *Rule 60(b) Motion*. In the *Rule 60(b) Motion*. Plaintiffs argue this Court should set aside its *Order Granting the Motion to Strike, Order Granting Sanctions,* and *Sanctions Order,* based upon Mr. Moquin's excusable neglect. Plaintiff's further argue the underlying *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 787 P.2d 777 (1990) because the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for the misconduct of their attorney.

33. Plaintiffs argue their failure to provide the damages computations and adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure and this Court's orders, as well as their failure to file oppositions to the *Motion to Strike* and *Motion for Sanctions* were all due to Mr. Moquin failing "to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Rule 60(b) Motion,* 1.

34. The *Rule 60(b) Motion* purports to support its arguments primarily through the *Declaration of Larry J. Willard. Rule 60(b) Motion,* Ex. 1 (*"Willard Declaration" and "WD"* in citations to the record)[5].

35. The *Willard Declaration* includes several statements about Mr. Moquin's alleged mental disorder. It states Mr. Willard is "**convinced**" Mr. Moquin was dealing with issues and demons beyond his control. *WD* ¶ 66. It further states he "**learned**" that Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work. *WD* ¶ 67. The *Willard Declaration* states Mr. Moquin suffered a "total mental breakdown." *WD* ¶ 68. It states Mr. Moquin **explained** to Mr. Willard he had been diagnosed with bipolar disorder. *WD* ¶ 70. He declares he believes Mr. Moquin's disorder to be "severe and debilitating." *WD* ¶ 73. He states he **now sees** "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on the case." *WD* ¶ 76. And, Mr. Willard declares he **can now see** how Mr. Moquin's alleged psychological issues affected Plaintiffs' case. *WD* ¶ 87 (emphasis supplied).

36. The *Rule 60(b) Motion* also includes an internet printout purporting to list symptoms of bipolar disorder (*Rule 60(b) Motion,* Ex. 5), and several documents related to alleged spousal abuse by Mr. Moquin, some of which reference Mr. Moquin's alleged bipolar disorder, and which include an Emergency Protective Order from a California proceeding (*Rule 60(b) Motion,* Ex. 6), a Pre-Booking Information Sheet from a California proceeding (*Rule 60(b) Motion,* Ex. 7) and a Request for Domestic Violence Restraining Order, also from a California proceeding (*Rule 60(b) Motion,*

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[5] The *Willard Declaration* includes paragraphs discussing the underlying facts of the action and the initial filing of the suit in California. These paragraphs are not relevant to the Court's determination of the *Rule 60(b) Motion* and are not considered. *See e.g.*, WD ¶¶ 1-51, 100.

Ex. 8). The documents from the California proceedings are not certified by the clerk of the court.

37. Defendants filed their *Opposition to Rule 60(b) Motion Relief* on May 18, 2018 ("*Opposition*").

38. Plaintiffs filed their *Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion* on May 29, 2018 ("*Reply*"). The *Reply* attached eleven (11) new exhibits, including the new *Declaration of Larry J. Willard in Response to Defendants' Opposition to Rule 60(b) Motion for Relief. Reply,* Ex. 1 ("*Reply Willard Declaration*" and "*RWD" for citations*). [6] The *Reply's* exhibits include copies of text messages between Mr. Willard and Mr. Moquin (*Reply,* Ex. 2, 4 and 7), copies of emails between Mr. Willard and his counsel (*Reply, Ex.* 3, 6, 8 and 10), a receipt detailing an alleged payment made by Mr. Willard to Mr. Moquin's doctor on March 13, 2018 (*Reply,* Ex. 5), and a letter from Mr. Williamson to Mr. Moquin dated May 14, 2018 (*Reply,* Ex. 9).

39. On June 6, 2018, Defendants filed their *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply*, arguing this Court should strike Exhibits 1-10 to the *Reply* because: (a) Defendants did not have the opportunity to respond to those exhibits in their *Opposition to the Rule 60(b) Motion*; (b) exhibits contained inadmissible hearsay and/or inadmissible lay opinion testimony; and (c) a number of exhibits were not relevant to this Court's determination of excusable neglect.

40. Defendants' *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply* was fully-briefed and submitted to this Court for decision on June 29,

[6] The Court disregards the paragraphs included in the *Willard Declaration* and the *Reply Willard Declaration* that can be construed to be stated appeal to the Court's sympathy. *See e.g., WD* ¶ 91 -100; *RWD* ¶ 67

2018. Subsequently, Plaintiffs' counsel stipulated to the filing of a sur-reply. No sur-reply was filed by Defendants.

41. In its *Sanctions Order*, the Court made the following findings of fact and conclusions of law, among others: First, Plaintiffs failed to provide damages disclosures and failed to properly disclose an expert witness in violation of this Court's express Orders. *Sanctions Order* ¶¶ 67, 68. Plaintiffs acknowledged their failure to properly disclose an expert witness in accordance with NRCP 16.1(a)(2)(B). *Stipulation and Order*, February 9, 2017. Plaintiffs did not thereafter attempt to properly disclose the expert witness for the entirety of 2017. Plaintiffs failed to comply with multiple orders of this Court. Thereafter, Defendants filed several motions to compel and Plaintiffs' non-compliance forced extension of trial and discovery deadlines on three separate occasions. This Court sanctioned Plaintiffs by ordering payment of Defendants' expenses incurred in filing the *Motion to Compel*.

42. Plaintiffs did not oppose the *Sanctions Motion* despite this Court's express admonitions that the Court was "seriously considering" dismissal.

43. If any of the following Conclusions of Law contain or may be construed to contain Findings of Fact, they are incorporated here and shall be treated as appropriately identified and designated.

CONCLUSIONS OF LAW

Based on the Court's Findings of Fact, the Court makes its Conclusions of Law as follows.

1. If any the foregoing Findings of Fact contain or may be construed to contain Conclusions of Law, they are incorporated here and shall be treated as appropriately identified and designated.

Rule 60(b) Standard

2. Under NRCP 60(b)(1), on motion, this Court may relieve a party from an order or final judgment[7] on grounds of mistake, inadvertence, surprise, or excusable neglect. NRCP 60(b)(1).

3. A party who seeks to set aside an order pursuant to NRCP 60(b)(1) "has the burden to prove mistake, inadvertence, surprise, or excusable neglect by a preponderance of the evidence." *Polivka v. Kuller*, 128 Nev. 926, 381 P.3d 651 (2012) (citations omitted); *see also Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 446, 488 P.2d 911, 915 (1971) ("'[t]he burden of proof on [a motion to set aside under Rule 60(b)] is on the moving party who must establish his position by a preponderance of the evidence.'") (quoting *Luz v. Lopes*, 55 Cal.2d 54, 10 Cal.Rptr. 161, 166, 358 P.2d 289, 294 (1960)).

The Rule 60(b) Motion is not Supported by Competent, Admissible and Substantial Evidence.

4. Plaintiffs' ground asserted to set aside the *Order Granting Defendants' Motion to Strike, Order Granting the Motion for Sanctions, and Sanctions Order*[8] is Mr. Moquin "failed to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Rule 60(b) Motion*, 1.

5. While this Court "has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b)," *Stoecklein v. Johnson Electric,*

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[7] This Court entered its *Order re Request for Entry of Judgment* on June 4, 2018, declining to enter judgment as the Court deemed it appropriate to consider the *Rule 60(b) Motion* on the underlying *Sanctions Order.*

[8] Plaintiffs argue that the *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the *Sanctions Order* did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Rule 60(b) Motion,* 12. This is addressed by the Court hereinafter.

Inc., 109 Nev. 268, 271, 849 P.2d 305, 307 (1993), "this discretion is a legal discretion and cannot be sustained where there is no competent evidence to justify the court's action." *Id.* (emphasis added) (citing *Lukey v. Thomas*, 75 Nev. 20, 22, 333 P.2d 979 (1959)); *see also Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (holding a court abuses its discretion when its decision is not supported by substantial evidence; substantial evidence "defined as that which a reasonable mind might accept as adequate to support a conclusion" (internal quotation marks omitted)).

6. The *Rule 60(b) Motion* purports to provide substantial evidence to support its legal argument through the *Willard Declaration* and the *Reply Willard Declaration* together with the attached exhibits, all of which contain statements and documents that are inadmissible, and in some instances, inadmissible on multiple grounds.

7. The *Willard Declaration* includes several statements about Mr. Moquin's alleged mental disorder. As set forth in the Findings of Fact, *supra,* Mr. Willard declares he is "convinced" Mr. Moquin was dealing with issues and demons beyond his control (*WD* ¶ 66); he "learned" Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work (WD ¶ 67; *RWD* ¶ 15); Mr. Moquin suffered a "total mental breakdown" (*WD* ¶ 68; *RWD* ¶16); Mr. Moquin explained to Mr. Willard he had been diagnosed with bipolar disorder (*WD* ¶ 70; *RWD* ¶ *37*); Mr. Willard believes Mr. Moquin's disorder to be "severe and debilitating" (*WD* ¶ 73); Mr. Willard now sees "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on

the case (*WD* ¶ 76); and, Mr. Willard can now see how Mr. Moquin's alleged psychological issues affected his case (*WD* ¶ 87).[9]

8. The *Willard Declaration* addresses Mr. Moquin's private life, including his personal mental status and the conflict in his marriage.

9. Mr. Willard statements are not all based on his own perceptions.

10. It logically follows, based on the subject matter, Mr. Willard could not have credibly obtained this information by observing it.

11. Mr. Willard lacks personal knowledge to testify to the assertions included in the *Willard Declaration* and the *Reply Willard Declaration* regarding Mr. Moquin's mental disorder, private personal life, and private marital conflicts.

12. It further logically follows, Mr. Willard could only have obtained this information by communication from Mr. Moquin (or Mr. Moquin's wife), although he does not overtly state this.

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[9] The *Willard Declaration and the Reply Willard Declaration* contain many nearly identical statements. They compare as follows:

***Willlard Declaration* Paragraph**	***Reply Willard Declaration* Paragraph**
53	7
54	8
59	9
63	11
64	12 (slightly differs)
65	13
67	15
68	16
69	35
70	38
71	39
82	10 (Similar - not exact)
89	3
91	67

13. The *Willard Declaration* and *Reply Willard Declaration* include inadmissible hearsay and under NRS 51.035 and 51.065. *See Agnello v. Walker*, 306 S.W.3d 666, 675 (Mo. App. 2010), as modified, (Apr. 27, 2018) (hearsay testimony or documentation cannot serve as the evidence necessary to meet movant's burden of persuasion to set aside judgment under Rule 60); *New Image Indus. v. Rice,* 603 So.2d 895, 897 (Ala. 1992) (affirming trial court's refusal to grant Rule 60 relief where the only evidence of excusable neglect was an affidavit containing inadmissible hearsay and speculation).

14. Separate and apart from the challenge to the *Willard Declaration* and the *Reply Willard Declaration* on hearsay grounds, Mr. Willard's statements are also speculative and therefore inadmissible. He does not declare he personally observed Mr. Moquin's alleged condition until he draws this unqualified conclusion late in the case, and, even if he had, he speculates what the mental disorder could cause and caused, offering an internet article to boost his credibility, which is also hearsay with no applicable exception offered.

15. The assertion describing Mr. Moquin's statement to Mr. Willard that Dr. Mar diagnosed Mr. Moquin with bipolar disorder (*WD* ¶ 69; *RWD* ¶35) is inadmissible hearsay with no exception under NRS 51.105(1) because the Mr. Willard's declaration does not constitute Mr. Moquin's declaration of "then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health." Instead, Dr. Mar, purportedly diagnosed Mr. Moquin; Mr. Moquin told Mr. Willard of Dr. Mar's purported diagnosis; and Mr. Willard makes the statement of Mr. Moquin's diagnosis. The statements were not spontaneous and instead were a basis for Mr. Moquin to request monetary assistance.

16. Even if it is construed that Mr. Moquin's report of Dr. Mar's diagnosis constituted Mr. Moquin's statement of then existing mental condition. Mr. Willard's statements are not admissible as contemporaneous statements Mr. Moquin made about his own present physical symptoms or feelings. *See* 2 McCormick on Evid. §273 (7th ed.) ("[s]tatements of the declarant's present bodily condition and symptoms, including pain and other feelings, offered to prove the truth of the statements, have been generally recognized as an exception to the hearsay rule. Special reliability is provided by the spontaneous quality of the declarations, assured by the requirement that the declaration purport to describe a condition presently existing at the time of the statement."). No spontaneous statement of Mr. Moquin, as the declarant, were offered.

17. The *Willard Declaration* and the *Reply Willard Declaration* also contains hearsay within hearsay, which is inadmissible under NRS 51.067.

18. Mr. Willard also purports to declare Mr. Moquin had a complete mental breakdown, how Mr. Moquin's symptoms of his alleged bipolar disorder might manifest, and how those symptoms may have affected Mr. Moquin's work. *WD* ¶¶ 68, 73-76 and 87-88; *RWD* ¶ 16, 38.

19. These statements are inadmissible as impermissible lay opinion under NRS 50.265. Mr. Willard is not a licensed health care provider qualified to opine on Mr. Moquin's mental condition, mental disorder, or symptoms of any disorder or condition that manifested.

20. Mr. Willard surmises, speculates and draws conclusions. He is not qualified to testify about what medical, physical, or mental condition Mr. Moquin may have, or the effect of that condition on his work. *White v. Corn*, 616 S.E.2d 49, 54, 46 Va. App. 123, 134 (2005) ("While lay witnesses may testify to the attitude and demeanor

of the defendant, lay witnesses cannot express an opinion as to the existence of a particular mental disease or condition.") (Citations omitted).

21. Plaintiffs contend Mr. Willard's opinions of how Mr. Moquin's alleged condition might manifest with symptoms and how those symptoms may have affected Mr. Moquin's work are appropriate because "lay witnesses can offer testimony as to a person's sanity." *Reply*, 2. Plaintiffs cite *Criswell v. State*, 84 Nev. 459, 464, 443 P.2d 552, 555 (1968) for the proposition that lay witnesses can offer testimony as to a person's sanity. However, *Criswell* was overruled in 2001. *See Finger v. State*, 117 Nev. 548, 576-77, 27 P.3d 66, 85 (2001) (en banc decision regarding the legal insanity defense and statutorily created "guilty, but mentally ill plea" and holding the legislative abolishment of insanity as a complete defense to a criminal offense unconstitutional, among other holdings, including that lay witnesses cannot testify as to "insanity" because the term has a precise and narrow definition under Nevada law).

22. The Court concludes the *Finger* holdings are not applicable here. First, the *Finger* case involves a defense to criminal charges. Second, Mr. Willard did not testify that Mr. Moquin was sane or insane; he testified about the diagnosis of bipolar disorder, possible symptoms of bipolar disorder and how those symptoms, if present, might have affected Mr. Moquin's work.

23. The Nevada Revised Statutes (Evidence Code) provides:

> A lay witness may testify to opinions or inferences that are "[r]ationally based on the perception of the witness; and ... [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265. A qualified expert may testify to matters within their "special knowledge, skill, experience, training or education" when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.

NRS 50.275; *Burnside v. State,* 131 Nev. Adv. Op. 40, ___, 352 P.3d 627, 636 (death penalty case detective allowed to testify about cell phone records as lay witness). Further,

> [t]he key to determining whether testimony constitutes lay or expert testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience? *See Randolph v. Collectramatic, Inc.,* 590 F.2d 844, 846 (10th Cir.1979) (observing that lay witness may not express opinion "as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness"); Fed.R.Evid. 701 advisory committee's note (2000 amend.) ("[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." (internal quotation marks omitted)); *State v. Tierney,* 150 N.H. 339, 839 A.2d 38, 46 (2003) ("Lay testimony must be confined to personal observations that any layperson would be capable of making.").

Id.

24. While the Nevada Supreme Court and Court of Appeals have not addressed lay witness testimony, such as that contained in the *Willard Declaration* and *Reply Willard Declaration,* regarding bipolar disorder, this has been specifically addressed by the Pennsylvania court and is persuasive here. In the case of *In re Petition for Involuntary Commitment of Joseph R. Barbour,* the Superior Court of Pennsylvania held, "Lay witness and non-expert could not provide expert testimony regarding involuntary committee's medical diagnosis, specifically the existence of mood disorder known as bipolar disorder." *In re Petition for Involuntary Commitment of Joseph R. Barbour,* 733 A.2d 1286 (PA. 1999). This Court therefore concludes such testimony is inadmissible to support the *Rule 60(b) Motion*.

25. The documents attached as Exhibits 6, 7 and 8 to the *Rule 60(b) Motion*, which purport to detail Mr. Moquin's alleged domestic abuse of his family, and which also contain statements about Mr. Moquin's alleged bipolar condition, are inadmissible as discussed, *supra*, with regard to bipolar disorder.

26. Exhibits 6, 7 and 8 to the *Rule 60(b) Motion* are not, and cannot be, authenticated by Mr. Willard. Mr. Willard is not the author of the documents and has no personal knowledge of their authenticity. He therefore cannot authenticate or identify the documents pursuant to NRS 52.015(1) or NRS 52.025.

27. Exhibits 6, 7 and 8 do not meet the requirements for presumed authenticity under NRS 52.125, as the exhibits are not certified copies of public records.

28. Pursuant to NRS 47.150, a judge or court may take judicial notice, whether requested to or not. Further, a judge or court shall take judicial notice if requested by a party and supplied with the necessary information. NRS 47.150. Here, no party requested this Court to take judicial notice of the California court records contained in the exhibits Exhibit 6 to the *Rule 60(b) Motion* and the *Reply* based on certified copies. The Court exercises its discretion and declines to take judicial notice here.

29. Moreover, even if Exhibits 6, 7 and 8 could be authenticated, the statements contained in those exhibits regarding Mr. Moquin's alleged mental disorder and condition, are inadmissible lay opinion about bipolar disorder and would still be inadmissible hearsay, as they were apparently authored by Mr. Moquin's wife, and Plaintiffs are offering them to prove that Mr. Moquin suffers from bipolar disorder and his life was in "shambles."

30. A number of *Reply* Exhibits and discussed in *Reply Willard Declaration* also contain inadmissible hearsay.

31. All of the texts and emails offered by Plaintiffs and authored by Mr. Moquin or Mr. O'Mara constitute inadmissible hearsay under NRS 51.035 and 51.065.

32. Specifically, Exhibit 2 and 3 to the *Reply*, the text messages authored by Mr. Moquin in Exhibit 4, the text messages authored by Mr. Moquin in Exhibit 7, the email authored by Mr. Moquin in Exhibit 8, and the emails authored by Mr. Moquin in Exhibit 10 are therefore disregarded as inadmissible hearsay.

33. Exhibits attached to the *Reply* also contain communications occurring after this Court issued its *Order Granting Motion to Strike* and its *Order Granting Sanctions.*

34. All of statements in the *Reply Willard Declaration* set forth after Paragraph 37 detail events and communications from late January, 2018 through late May, 2018, all of which occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order. Willard Declaration* ¶¶ 37-67.

35. Exhibits 5, 6, 7, 8, 9, and 10 to the *Reply* contain only communications and descriptions of events that occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order.*

36. Logically, relevant events asserted to support Plaintiffs' argument of excusable neglect must have necessarily occurred prior to the entry of the orders Plaintiffs seek to set aside.

37. Statements in the *Reply Willard Declaration* after Paragraph 37 and Exhibits 5, 6, 7, 8, 9, and10 to the *Reply* are not relevant to this Court's determination of

whether Plaintiffs have met their burden of proving excusable neglect under NRCP 60(b).

38. Competent and substantial evidence has not been presented to establish *Rule 60(b) Relief.*

Notwithstanding Plaintiff's Lack of Admissible Evidence, Plaintiffs Fail to Meet their Burden under Rule 60(b) to Set Aside the *Sanctions Order* and *Order Granting Motion to Strike.*

39. Under Nevada law, "'clients must be held accountable for the acts and omissions of their attorneys.'" *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 204, 322 P.3d 429, 433 (2014) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-97, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). The client "'voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts of omissions of this freely selected agent.'" *Huckabay Props.*, 130 Nev. at 204, 322 P.3d at 433 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (rejecting the argument that petitioner's claim should not have been dismissed based on counsel's unexcused conduct because petitioner voluntarily chose his attorney).

40. In *Huckabay Props.*, the Nevada Supreme Court dismissed an appeal where appellant's counsel failed to file an opening brief following two granted extensions and a court order granting appellants a final extension. *Huckabay Props.*, 130 Nev. 209, 322 P.3d at 437. In *Huckabay Props.,* the appellant was represented by

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two attorneys. In dismissing the appeal, and applicable to civil litigation at the trial court level here, the Court held:

> Nevada's jurisprudence expresses a policy preference for merits-based resolution of appeals, and our appellate procedure rules embody this policy, among others, litigants should not read the rules or any of this court's decisions as endorsing noncompliance with court rules and directives, as to do so risks forfeiting appellate relief. In these appeals, appellants failed to timely file the opening brief and appendix after having been warned that failure to do so could result in the appeals' dismissals. Appellants actually had two attorneys who received copies of this court's notices and orders regarding the briefing deadline, but they nevertheless failed to comply with briefing deadlines and court rules and orders . . . and an appeal may be dismissed for failure to comply with court rules and orders and still be consistent with the court's preference for deciding cases on their merits, as that policy must be balanced against other policies, including the public's interest in an expeditious appellate process, the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administration considerations, such as case and docket management. As for declining to dismiss the appeal because the dilatory conduct was occasioned by counsel, and not the client, that reasoning does not comport with general agency principles, under which a client is bound by its civil attorney's actions or inactions.

Huckabay Props. v. NC Auto Parts, 130 Nev. at 209, 322 P.3d at 437.

41. In *Huckabay Props.,* however, the court recognized exceptional circumstances providing two possible exceptions "to the general agency rule that the 'sins' of the lawyer are visited upon his client where the lawyer's addictive disorder and abandonment of his legal practice or criminal conduct justified relief for the victimized client." *Id.* at 204 n.4, 322 P.3d at 434 n.4 (citing *Passarelli*, 102 Nev. at 286). Notably, these exceptions noted by the court in *Huckabay Props.* are not present here, as the facts of *Pasarelli* are readily distinguishable.

42. First, in *Passarelli*, the record included evidence the attorney suffered from a substance abuse disorder that resulted in missed office days and appointments and an inability to function. *Passarelli*, 102 Nev. at 285. Second, the attorney voluntarily

closed his law practice. *Id.* Third, the attorney was placed on disability inactive status by the Nevada Bar. *Id.* Finally, the client in *Passarelli* had only one attorney. *Id.*

43. None of these facts are present in this case. As concluded, *supra*, no competent, reliable and admissible evidence of Mr. Moquin's claimed mental disorder is before this Court. Further, there is no evidence of missed meetings or absences from office due to the claimed conditions. There is no evidence that Mr. Moquin closed his law practice.

44. Mr. Moquin is on active status with the California Bar. *Opposition to Rule 60(b) Motion*, Ex. 5; *Attorney Search, The State Bar of California, http://members.calbar.ca.gov/fal/LicenseeSearch* (last visited Nov. 30, 2018).

45. Pursuant to NRS 47.150, the Court may take judicial notice, whether requested or not. A fact subject to judicial notice must be either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. NRS 47.130. It follows that the State Bar of California provides accurate information regarding licensing of attorneys which cannot be reasonably questioned. The Court takes judicial notice of Mr. Moquin's active status.

46. Applied here, the *Huckabay Props./Passarelli* analysis compels denial of the *Rule 60(b) Motion*. The standard for "excusable neglect" based on activities of a party's attorney requires the attorney be completely unable to respond or appear in the proceedings. *See Passarelli*, 102 Nev. at 285 (court found excusable neglect where attorney failed to attend trial due to psychiatric disorder which caused him to shut down his practice and was placed on disability inactive status by the State Bar of Nevada); *see also Cicerchia v. Cicerchia*, 77 Nev. 158, 160-61, 360 P.2d 839, 841 (1961) (court

found excusable neglect where respondent lived out of state and suffered a nervous breakdown shortly after retaining out of state counsel, who was unaware and uninformed of the time to appear).

47. Here, Plaintiffs' attorneys did not completely abandon the case. Rather, the Nevada Rules of Civil Procedure, this Court's express orders, and Defendants' requests for damages computations and expert disclosures were ignored. Further, this Court granted, upon was also ignored.

48. Plaintiffs attempt to excuse this conduct in their *Rule 60(b) Motion* by claiming Mr. Moquin had suffered a complete mental breakdown and his personal life was "in shambles." In addition, to the preclusion of evidence discussed, *supra*, the evidence is vague at best regarding these assertions and vague regarding if, and when, Mr. Moquin's alleged disorder impaired him and are vague in asserting when any of the alleged events took place. Plaintiffs do attach additional exhibits to their *Reply* that offer some information on timing but are inadequate for the Court's determination.

49. Specifically, Exhibit 2 to the *Reply* appears to be a text string between Mr. Willard and Mr. Moquin from December 2, 2017 through December 6, 2017, in which Mr. Willard inquires about the status of Plaintiffs' filing in response to the *Motion for Sanctions*. *Reply*, Ex. 2. The text messages reflect Mr. Willard was aware of the initial deadline, December 4, 2017, for Plaintiffs to respond to the *Motion for Sanctions* (based on the November 15, 2017 filing date and electronic service).

50. Defendants agreed to extensions through 3:00 pm on December 6, 2017 for Plaintiffs to file their oppositions.

51. The Court granted an additional extension through December 18, 2018.

52. Plaintiffs had knowledge of the initial filing deadline. They were aware no opposition papers were filed. Mr. Willard continued to communicate with both Mr. Moquin and Mr. O'Mara from December 11 until December 25, 2017 regarding the delinquent filings (*Reply,* Ex. 3, 4), well after this Court's final filing deadline of December 18, 2017. *Sanctions Order* ¶ 95.

53. Despite knowing no oppositions had been filed, neither Mr. Willard (through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or this Court to address the status of this case. *Sanctions Order* ¶ 98.

54. Plaintiffs did nothing to apprise this Court of any issues until they filed the *Rule 60(b) Motion*.

55. Plaintiffs started looking for attorneys who might be able to help. *Reply Willard Declaration* ¶ 36. Plaintiffs instead provided personal financial assistance to Mr. Moquin and did not terminate his services. *WD* ¶ 71; *RWD* ¶ 39.

56. Plaintiffs knew timely oppositions were not filed.

57. Plaintiffs chose to retain Mr. Moquin and did not terminate his representation, even after becoming aware that he did not file a timely response to the *Motion for Sanctions*. Plaintiffs cannot now avoid the consequences of the acts of omissions of their freely selected agent.

58. Plaintiffs voluntarily chose to stop seeking new counsel to assist and chose to continue to rely on Mr. Moquin solely for financial reasons. *Willard Declaration* ¶ 81.

59. Plaintiffs' multiple instances of non-compliance, including the Plaintiffs failure to provide a compliant damages disclosure in this action, is reflected in the court file for this proceeding, occurring well before Mr. Moquin's purported breakdown in

December, 2017 or January, 2018 asserted as preventing him from opposing the motions.

60. Mr. O'Mara was counsel of record and did not report any issues related to Mr. Moquin to this Court until the filing of his *Notice* in March. *Notice, 1.*

61. The Court gave counsel notice of the seriousness of Plaintiffs' violations and expressed it was considering dismissal based on those violations. *Opposition to Rule 60(b) Motion*. Ex. 3, December 12, 2017 Transcript ("you need to know going into these oppositions, that I'm very seriously considering granting all of it . . . I haven't decided it, but I need to see compelling opposition not to grant it."). Plaintiffs and their attorneys were given notice of the potential consequence of failing to file an opposition to the *Sanctions Motion.*

62. Mr. Moquin did not abandon Plaintiffs. He appeared at status hearings, participated in depositions, filed motions and other papers, including a lengthy opposition to Defendants' motion for partial summary judgment. Mr. Moquin participated in oral arguments and filed two summary judgment motions with substantial supporting exhibits and detailed declarations.

63. A party "cannot be relieved from a judgment [order] taken against him in consequence of the neglect, carelessness, forgetfulness, or inattention of his attorney," *Cicerchia*, 77 Nev. at 161.

Plaintiffs Knew of Mr. Moquin's Alleged Condition and Alleged Non-responsiveness prior to the *Sanctions Order* and did Nothing and, therefore, Cannot Establish Excusable Neglect.

64. In the *Willard Declaration* and *Reply Willard Declaration,* Mr. Willard admits he knew Mr. Moquin was having personal financial difficulties and that he borrowed money from friends and family to fund Mr. Moquin's personal expenses. *WD*

¶¶ 63-65; *RWD* ¶ 11-13. Mr. Willard also admits that he recommended a psychiatrist to Mr. Moquin and he again borrowed money from a friend to pay for Mr. Moquin's treatment. *WD* ¶¶ 68-71; *RWD* ¶ 11-13. Mr. Willard was aware of Mr. Moquin's alleged problems prior to this Court's *Order Granting Motion to Strike and Sanctions Order*, yet continued to allow Mr. Moquin to represent Plaintiffs.

65. Mr. Willard was aware of Mr. Moquin's inaction which distinguishes this case from the cases upon which Plaintiffs rely in the *Rule 60(b) Motion*, where the parties were unaware of their attorneys' problems. *See e.g., Passarelli*, 102 Nev. at 286 ("Passarelli was effectually and unknowingly deprived of legal representation") (emphasis added); *U.S. v. Cirami*, 563 F.2d 26, 29-31 (2d Cir. 1977) (client discovered that attorney had a mental disorder that prevented him from opposing summary judgment more than two years later); *Boehner v. Heise*, 2009 WL 1360975 at *2 (S.D.N.Y. 2009) (client did not learn case had been dismissed or and did not learn of attorney's mental condition until several months after dismissal). Here, Mr. Willard knew of the actions that supported the *Sanctions Order*.

66. Mr. Willard admits he was informed by Mr. O'Mara prior to the dismissal of the Plaintiffs' claims that Mr. Moquin was not responsive. Plaintiffs failed to replace Mr. Moquin or take other action due to perceived financial reasons. *Willard Declaration* ¶81. Plaintiffs' knowledge and inaction vitiates excuse for neglect.

67. The *Rule 60(b) Motion* cites authority for the proposition that even "where an attorney's mishandling of a movant's case stems from the attorney's mental illness," which might justify relief under Rule 60(b). However, "client diligence must still be shown." *Cobos v. Adelphi Univ.*, 179 F.R.D. 381, 388 (E.D.N.Y. 1998); see also *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 357 (5th Cir. 1993) ("A party has a

duty of diligence to inquire about the status of a case...."); *Pryor v. U.S. Postal Service*, 769 F.2d 281, 287 (5th Cir. 1985) ("This Court has pointedly announced that a party has a duty of diligence to inquire about the status of a case....").

68. Mr. Willard's claim that he had no choice but to continue working with Mr. Moquin due to financial issues lacks credibility as he admits he was able to borrow money to fund Mr. Moquin's personal life and medical treatment. It logically follows he had resources to retain new attorneys at the time.

69. Plaintiffs have not established by substantial evidence that they exercise diligence to rectify representation in their case despite ample knowledge of Mr. Moquin's non-responsiveness.

The *Rule 60(b) Motion* should be Denied because Two Attorneys Represented Plaintiffs had an Obligation to Ensure Compliance with the Nevada Rules of Civil Procedure and this Court's Orders.

70. Plaintiffs' *Rule 60(b) Motion* ignores the fact David O'Mara served as local counsel. In Nevada, the responsibilities of local counsel are clearly defined, and encompass active responsibility to represent the client and manage the case:

> (a) The Nevada attorney of record shall be responsible for and actively participate in the representation of a client in any proceeding that is subject to this rule.
> (b) The Nevada attorney of record shall be present at all motions, pre-trials, or any matters in open court unless otherwise ordered by the court.
> (c) The Nevada attorney of record shall be responsible to the court...for the administration of any proceeding that is subject to this rule and for compliance with all state and local rules of practice. It is the responsibility of Nevada counsel to ensure that the proceeding is tried and managed in accordance with all applicable Nevada procedural and ethical rules.

SCR 42(14). Mr. O'Mara's representation, even if contractually limited, was governed by this rule.

71. Mr. O'Mara expressly "consent[ed] as Nevada Counsel of Record to the designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his *Motion to Associate Counsel*. *Motion to Associate Counsel*.

72. Mr. O'Mara attended every hearing and court conference in this case. And, among other things, Mr. O'Mara signed the Verified Complaint and the First Amended Verified Complaint. *Complaint*; *FAC*.

73. WDCR 23(1) provides:

> Counsel who has appeared for any party shall represent that party in the case and shall be recognized by the court and by all parties as having control of the client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing office, in accordance with SCR 46 and this rule.

WDCR 23.

74. Mr. O'Mara was the sole signatory on Plaintiffs' deficient initial disclosures, (*Opposition to Rule 60(b) Motion,* Ex. 6), the uncured deficiencies of which were a basis for sanction of dismissal. *Sanctions Order*.

75. Mr. O'Mara also signed and filed the *Brief Extension Request* with this Court representing,

> Counsel has been diligently working for weeks to respond to Defendant's serial motions, which include seeking dismissal of Plaintiffs' case. With the full intention of submitting said responses, Counsel for Plaintiffs encountered unforeseen computer issues.... Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and submit the oppositions to Defendants' three motions.

Brief Extension Request.

76. Mr. O'Mara's involvement precludes a conclusion of excusable neglect here.

The *Sanctions Order* was Sufficient under Nevada Law

77. Plaintiffs assert that the *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the *Sanctions Order* did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Rule 60(b) Motion* at 12. However, consideration of this factor is discretionary, not mandatory. See *Young v. Johnny Ribeiro*, 106 Nev. at 93 ("The factors a court **may** properly consider include . . . whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney") (emphasis supplied).

78. The Court concludes factors enumerated in *Young v. Johnny Ribeiro Bldg., Inc.* were met by the *Sanctions Order*. Specifically, the Nevada Supreme Court held where a court issues an order of dismissal with prejudice as a discovery sanction a court may consider, among others, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, and the feasibility and fairness of alternative, less severe sanctions. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. at 93. The factors are not mandatory so long as the Court supports the order with "an express, careful and preferably written explanation of the court's analysis of the pertinent factors." *Id.*

79. While each suggested factor discussion in the *Sanctions Order* was not labeled by factor, the Court addressed the factors it deemed appropriate.

80. In light of the circumstances in this case, the dismissal of Plaintiffs' claims did not unfairly penalize Plaintiffs based on the factors analyzed in the *Sanctions Order*. 80.

81. Plaintiffs assert this Court must address the additional factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). *Yochum* involves relief from a default judgment and not an order, as here, where judgment has not been entered. *Yochum* does not preclude denial of the motion.

The *Rule 60(b) Motion* should be Denied.

82. After weighing the credibility and admissibility of the evidence provided in support of the *Rule 60(b) Motion,* substantial evidence has not been presented to establish excusable neglect.

83. Plaintiffs have failed to meet their burden of proving, by a preponderance of the evidence, excusable neglect so as to justify relief under NRCP 60(b).

ORDER

Based upon the foregoing, Plaintiffs' *Rule 60(b) Motion* is **DENIED**, in its entirety.

DATED this 31st day of November, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 30 day of November, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

RICHARD WILLIAMSON, ESQ.

JONATHAN TEW, ESQ.

BRIAN IRVINE, ESQ.

ANJALI WEBSTER, ESQ.

JOHN DESMOND, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

FILED
Electronically
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Jacqueline Bryant
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Transaction # 7018896

1880
DICKINSON WRIGHT, PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (844) 670-6009
Email: Jdesmond@dickinsonwright.com
Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

Attorney for Defendants
Berry Hinckley Industries and
Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual

Defendants.
_____/

CASE NO. CV14-01712

DEPT. 6

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.

/

~~[PROPOSED]~~ **JUDGMENT**

This action, having come before this Court, the Honorable Lynne K. Simons presiding, and all of the claims of Plaintiffs Larry J. Willard, individually and as trustee of the Larry James Willard Trust (the "Willard Plaintiffs"), having been dismissed by this Court with prejudice in its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions filed herein on March 6, 2018, this Court having denied the Willard Plaintiffs' NRCP 60(b) Motion for Relief on November 30, 2018, and all of the counterclaims of Defendants Berry-Hinckley Industries ("BHI") and Jerry Herbst having been dismissed by this Court in its Order granting Defendants' Motion for voluntary dismissal filed herein on April 13, 2018,

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendants and against the Willard Plaintiffs on all of the Willard Plaintiffs' claims and that such claims are dismissed with prejudice.

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IT IS FURTHER ORDERED AND ADJUDGED that Defendants' counterclaims are dismissed without prejudice.

DATED this 11th day of December, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 11525
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (844) 670-6009
Email: Jdesmond@dickinsonwright.com
Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

Attorneys for Defendants
Berry Hinckley Industries, and
Jerry Herbst

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DICKINSON WRIGHT, PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (844) 670-6009
Email: Jdesmond@dickinsonwright.com
Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

Attorney for Berry Hinckley Industries and Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;

Defendants.
/

CASE NO. CV14-01712

DEPT. 6

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.

_____/

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that on December 11, 2018, a Judgment was entered in the above-captioned matter in favor of Defendants and against the Willard Plaintiffs on all of the Willard Plaintiffs' claims and that such claims are dismissed with prejudice. A true and correct copy of the order is attached hereto as **Exhibit 1.**

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 11th day of December, 2018.

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (844) 670-6009
Email: Jdesmond@dickinsonwright.com
Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached **NOTICE OF ENTRY OF JUDGMENT** on the parties through the Second Judicial District Court's E-Flex filing system to the following:

Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Attorneys for Plaintiffs/Counterdefendants

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
3287 Ruffino Lane
San Jose, California 95148

DATED this 11th day of December, 2018.

/s/ Mina Reel
An employee of DICKINSON WRIGHT PLLC

EXHIBIT TABLE

Exhibit	Description	Pages[1]
1	December 11, 2018, Judgment	3

[1] Exhibit page counts are exclusive of exhibit slip sheets.

FILED
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EXHIBIT 1

EXHIBIT 1

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1880
DICKINSON WRIGHT, PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (844) 670-6009
Email: Jdesmond@dickinsonwright.com
Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

Attorney for Defendants
Berry Hinckley Industries and
Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual

Defendants.
_____/

CASE NO. CV14-01712

DEPT. 6

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.
_____/

~~[PROPOSED]~~ JUDGMENT

This action, having come before this Court, the Honorable Lynne K. Simons presiding, and all of the claims of Plaintiffs Larry J. Willard, individually and as trustee of the Larry James Willard Trust (the "Willard Plaintiffs"), having been dismissed by this Court with prejudice in its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions filed herein on March 6, 2018, this Court having denied the Willard Plaintiffs' NRCP 60(b) Motion for Relief on November 30, 2018, and all of the counterclaims of Defendants Berry-Hinckley Industries ("BHI") and Jerry Herbst having been dismissed by this Court in its Order granting Defendants' Motion for voluntary dismissal filed herein on April 13, 2018,

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendants and against the Willard Plaintiffs on all of the Willard Plaintiffs' claims and that such claims are dismissed with prejudice.

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///

IT IS FURTHER ORDERED AND ADJUDGED that Defendants' counterclaims are dismissed without prejudice.

DATED this 11th day of December, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 11525
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (844) 670-6009
Email: Jdesmond@dickinsonwright.com
Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

Attorneys for Defendants
Berry Hinckley Industries, and
Jerry Herbst

CODE: 2515
G. David Robertson, Esq., SBN 1001
Richard D. Williamson, Esq., SBN 9932
Jonathan Joel Tew, Esq., SBN 11874
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Telephone: (775) 329-5600
Facsimile: (775) 348-8300
Attorneys for Plaintiffs/Counterdefendants/Appellants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual

Defendants.

BERRY-HINCKLEY INDUSTRIES a Nevada corporation; and JERRY HERBST, an individual,

Counterclaimants,

vs.

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation,

Counterdefendants.

Case No. CV14-01712

Dept. No. 6

NOTICE OF APPEAL

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Plaintiff Overland Development Corporation, hereby appeal to the Nevada Supreme Court from (1) the Findings of Fact, Conclusions of Law, and Order on Defendants' Motions for Sanctions, entered on March 6, 2018 (Exhibit 1); (2) the Order Denying Plaintiffs' Rule 60(b) Motion for Relief, entered on November 30, 2018 (Exhibit 2); and (3) the Judgment, entered on December 11, 2018 (Exhibit 3). These Plaintiffs also appeal from all other rulings and orders made final and appealable by the foregoing.

DATED this 28th day of December, 2018.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

By: _____
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
Attorneys for Plaintiffs/Counterdefendants Appellants

Robertson, Johnson,
Miller & Williamson
50 West Liberty Street,
Suite 600
Reno. Nevada 89501

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 28th day of December, 2018, I electronically filed the foregoing **NOTICE OF APPEAL** with the Clerk of the Court by using the ECF system which served the following parties electronically:

John P. Desmond, Esq.
Brian R. Irvine, Esq.
Anjali D. Webster, Esq.
Dickinson Wright
100 West Liberty Street, Suite 940
Reno, NV 89501
Attorneys for Defendants/Counterclaimants

Robert L. Eisenberg, Esq.
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno NV 89519
775-786-6868
Attorneys for Plaintiffs/Counterdefendants Appellants

I further certify that on the 28th day of December, 2018, I caused to be deposited in the U.S. Mail, first-class postage fully prepaid, a true and correct copy of the foregoing **NOTICE OF APPEAL**, addressed to the following:

John P. Desmond, Esq.
Brian R. Irvine, Esq.
Anjali D. Webster, Esq.
Dickinson Wright
100 West Liberty Street, Suite 940
Reno, NV 89501
Attorneys for Defendants/Counterclaimants

Robert L. Eisenberg, Esq.
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno NV 89519
775-786-6868
Attorneys for Plaintiffs/Counterdefendants Appellants

An Employee of Robertson, Johnson, Miller & Williamson

Index of Exhibits

Exhibit	Description	Pages
1	Findings of Fact, Conclusions of Law, and Order on Defendants' Motions for Sanctions, entered on March 6, 2018	34
2	Order Denying Plaintiffs' Rule 60(b) Motion for Relief, entered on November 30, 2018	32
3	Judgment, entered on December 11, 2018	3

Robertson, Johnson, Miller & Williamson
50 West Liberty Street, Suite 600
Reno. Nevada 89501

EXHIBIT “1”

EXHIBIT “1”

EXHIBIT “1”

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Transaction # 6564287

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DICKINSON WRIGHT
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (775) 786-0131
Email: Jdesmond@dickinsonwright.com
Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

Attorney for Defendants
Berry Hinckley Industries, and
Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;

Defendants.
/

CASE NO. CV14-01712
DEPT. 6

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.

_____/

~~[PROPOSED]~~ **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON DEFENDANTS' MOTION FOR SANCTIONS**

1. Plaintiffs in this matter are Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund; Overland Development Corporation, a California corporation (collectively, "Willard" or the "Willard Plaintiffs"); Edward E. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Woolcy"). The Willard Plaintiffs are also counter-defendants in this matter.

2. Plaintiffs' counsel are Brian Moquin, a California attorney who has been admitted to practice in Nevada *pro hac vice*, and David O'Mara of the O'Mara Law Firm, P.C., who is serving as local counsel.

3. Defendants/counter-claimants in this matter are Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively, "Defendants").

4. The Motion before this Court is Defendants' Motion for Sanctions, wherein Defendants sought, in pertinent part, dismissal with prejudice of this action pursuant to NRCP 16.1(e)(3), NRCP 37(b)(2), NRCP 41(b), and *Blanco v. Blanco*, 129 Nev. ___, 311 P.3d 1170. (Defendants' Motion).

5. Defendants' Motion was filed on November 15, 2017. Plaintiffs did not file an Opposition, despite Defendants and this Court granting several extensions. Defendants' Motion was submitted to this Court on December 18, 2017.

6. This Court, having considered the briefing, and being otherwise fully advised, and GOOD CAUSE APPEARING, hereby finds the following facts and makes the following conclusions of law:

FINDINGS OF FACT

Plaintiffs' Complaint

7. On August 8, 2014, Plaintiffs commenced this action against Defendants, filing a joint complaint against them. (Complaint).[1]

8. Willard sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for $19,443,836.94, discounted by 4% per the lease to $15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. (First Amended Complaint ("FAC")).

9. Willard had also sought several other categories of damages which have since been dismissed or withdrawn. (May 30, 2017, Order).

10. Wooley sought the following damages against Defendants for an alleged breach of the lease between Wooley and BHI: (1) "rental income in the amount of $4,420,244.00 that [Wooley] otherwise would have received," discounted by a rate of 4% as specified in the Wooley Lease to $3,323,543.90 as of March 1, 2013; (2) a "diminution in value in an amount to be proven at trial but which is at least $2,000,000"; (3) property taxes in the amount of $1,500; (4) insurance for $3,840; (5) maintenance costs of $4,000; (6) management costs of $2,500; and (7) security deposit from subtenant for $2,485.00. (FAC).

11. Wooley had also sought several other categories of damages which have since been dismissed or withdrawn. (May 30, 2017, Order).

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[1]All of the referenced documents have been filed with this Court in this case, either as pleadings/ briefings/ motions or as exhibits to the same. References to "Defendants' Motion" are to Defendants' Motion for Sanctions. References to "Willard Motion" or "Wooley Motion" are to the Plaintiffs' respective Motions for Summary Judgment.

Plaintiffs' Initial Disclosures

12. On December 12, 2014, Plaintiffs provided their initial disclosures. (Exhibit 1 to Defendants' Motion for Sanctions).

13. However, while Plaintiffs disclosed anticipated witnesses and documents, they did not provide any computation of their claimed damages, notwithstanding the express requirement to do so set forth in NRCP 16.1(a)(1)(C).

Defendants' February 12, 2015, Letter

14. On February 12, 2015, Defendants wrote to Plaintiffs regarding the deficiencies in their initial disclosures, and informing them that the disclosures did not include the damages computations required by the Nevada Rules of Civil Procedure. (Exhibit 4 to Defendants' Motion for Sanctions).

15. Defendants advised Plaintiffs that their failure to timely comply would result in Defendants seeking sanctions. *Id.*

16. However, Plaintiffs did not comply with their NRCP 16.1 obligations upon receipt of this letter or any time thereafter.

Plaintiffs' Interrogatory Responses

17. In April of 2015, Defendants served Plaintiffs with written discovery. (June 23, 2015, Motion to Compel).

18. Defendants had not received any NRCP 16.1 damages disclosures from Plaintiffs, and asked Plaintiffs in separate interrogatories to "[p]lease explain in detail how the damages...alleged in your Amended Complaint were calculated." (Plaintiffs' Interrogatory Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).

19. Plaintiffs did not respond, even after Defendants granted them multiple extensions, requiring Defendants to file a motion to compel. (June 23, 2015, Motion to Compel).

20. This Court granted the Motion to Compel, which Plaintiffs failed to oppose. Therein, this Court ordered, in pertinent part, that Plaintiffs shall pay Defendants' reasonable expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

21. Only then did Plaintiffs respond, and, in pertinent part, simply repeated the allegations in their Complaint when discussing their damages. (Plaintiffs' Interrogatory Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).

22. Notably, these Court-ordered responses were the last time Plaintiffs provided anything that even came close to a damages disclosure until October of 2017, and even these did not comply with the requirements of NRCP 16.1.

23. Plaintiffs did not pay Defendants' reasonable expenses, despite the direct order from this Court to do so.

24. Further, the fact that the Court imposed monetary sanctions on Plaintiffs in 2015 clearly did not deter any of their subsequent conduct in continuing to fail to comply with their discovery obligations and Court orders.

The September 3, 2015, Stipulation and Order to Continue Trial Date

25. On August 28, 2015, Defendants wrote to Plaintiffs, referencing Plaintiffs' continued failure to comply with discovery obligations and resulting prejudice to Defendants, and noting that Plaintiffs had also yet to comply with the promise they made during a status conference before this Court to provide Defendants with discovery responses to Defendants' outstanding discovery requests in advance of the parties' depositions scheduled to begin on August 20, 2015. (Exhibit 7 to Defendants' Motion for Sanctions).

26. Plaintiffs' failure to comply with discovery obligations necessitated a continuance of the trial date and an extension of all discovery deadlines. (September 3, 2015, Stipulation and Order).

The Parties' May 2, 2016, Stipulation and Order to Continue the Trial Date

27. In March of 2016, Defendants wrote Plaintiffs twice, seeking documentation that Plaintiffs failed to provide, and asking that Plaintiffs comply with their NRCP 26(e) obligations

to supplement their responses as necessary. (Exhibits 8 and 9 to Defendants' Motion for Sanctions).

28. On April 20, 2016, Defendants continued to request the information that they sought in their March 2016 letters, noting that Plaintiffs had promised to provide the documents but they had not done so. (Exhibit 10 to Defendants' Motion).

29. Defendants again requested Plaintiffs' NRCP 16.1 damages calculations, noting that "this is an issue which we have raised on multiple occasions." *Id.*

30. Yet again, Plaintiffs did not provide their NRCP 16.1 calculations.

31. Defendants also stated that "[y]our clients' failure to provide us with the discovery documents ha[s] prejudiced our ability to prepare a defense on behalf of our clients. Without such documents, we cannot depose several witnesses, and our experts are unable to complete their opinions. This also jeopardizes our ability to submit dispositive motions with complete information in time for the Court to fully consider those motions." *Id.*

32. Due to Plaintiffs continued failure to meet discovery obligations, the parties agreed to continue the trial date for a second time. The agreed-upon basis for a continuance was that Plaintiffs needed to provide Defendants with documents and information, and also needed to provide "Plaintiffs' NRCP 16.1 damages calculations." (May 2, 2016, Stipulation and Order). This Court signed the Order, adding that "no further continuances will be granted." *Id.*

33. Following the second continuance, trial was scheduled for May 2, 2017, and discovery was set to close on March 2, 2017.

Plaintiffs' Unsuccessful Purported Disclosure of Daniel Gluhaich as a Non-Retained Expert Witness

34. On December 2, 2016, Plaintiffs purported to disclose Daniel Gluhaich as a non-retained expert. (Exhibit 11 to Defendants' Motion).

35. However, while Plaintiffs' disclosure generally referenced the categories as to which Mr. Gluhaich was expected to testify, Plaintiffs did not provide "a summary of the facts

and opinions to which the witness is expected to testify," as required by NRCP 16.1(a)(2)(B).[2] *Id.*

36. In fact, Plaintiffs immediately admitted that their disclosure of Mr. Gluhaich was inadequate and did not comply with NRCP 16.1, reiterating in an email to Defendants that Defendants had agreed to "allow Plaintiffs to provide an amended expert witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich will be testifying...." (Exhibit 12 to Defendants' Motion).

37. However, Plaintiffs did not provide an amended disclosure on December 8 or any time thereafter.

The Parties' December 2016 Correspondence

38. On December 9, 2016, Defendants' counsel wrote that Defendants did not receive the amended disclosure, or dates pursuant to which Defendants could depose Mr. Gluhaich. (Exhibit 13 to Defendants' Motion). Defendants advised Plaintiffs' counsel that "[o]bviously, we will be prejudiced by further delay in learning all of the expert opinion testimony that plaintiffs intent to present at trial. Please provide that information immediately." *Id.*

39. Defendants also addressed Plaintiffs' continued failure to provide their NRCP 16.1 damages. *Id.* On December 5, 2016, Wooley had provided a spreadsheet of damages expressly "for use in the ongoing informal settlement negotiations between Tim Herbst and Ed Wooley," and asked Defendants' counsel to "forward...to Tim Herbst as [Defendants' counsel saw] fit." (Exhibit 12 to Defendants' Motion). Plaintiffs' counsel also stated that he would "be

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[2]In contrast, Defendants disclosed Michelle Salazar as an expert and served Plaintiffs with Ms. Salazar's report, which included, as required under NRCP 16.1(a)(2)(B) "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

tendering supplemental disclosures in the imminent future that will include the actual spreadsheet." *Id.* Defendants responded to this settlement information expressing concern about Wooley's continued failure to provide NRCP 16.1 damages, and once again demanded NRCP 16.1 damages computations from all Plaintiffs, immediately. (Exhibit 13 to Defendants' Motion).

40. On December 23, 2016, Defendants' counsel discussed with Plaintiffs' counsel Plaintiffs' continued failure to properly disclose Mr. Gluhaich or even work with Defendants on expert deposition dates, even though Defendants had provided Plaintiffs an extension. (Exhibit 14 to Defendants' Motion).

41. Defendants also stated that this conduct was prejudicing Defendants and making it impossible for Defendants to comply with discovery deadlines for rebuttal experts. *Id.*

42. Next, Defendants expressed their concerns to Wooley that the damages spreadsheet recently provided for settlement purposes only, which Defendants could not share with their expert or use to prepare any defenses, contained a "new damages model that Plaintiffs had never before utilized in the case," and prejudiced Defendants in that they were unable to conduct discovery about this new computation of damages or the methodology used to arrive at the purported numbers in the Wooley settlement-only spreadsheet. *Id.*

43. Defendants concluded that "[w]e still have never received an NRCP 16.1 damages computation from either set of Plaintiffs, despite numerous demands. Please ensure that Plaintiffs meet their obligations to provide such computations immediately, or we will seek to preclude Plaintiffs from seeking any non-disclosed damages at trial, including those contained in the Wooley spreadsheet you sent me on December 5." *Id.* Defendants also added that they reserved the right to provide Plaintiffs' damages disclosure to their expert so that she could provide new opinions about any new damages model. *Id.*

44. On December 27, 2016, Plaintiffs' counsel responded. (Exhibit 15 to Defendants' Motion). Plaintiffs did not address their failure to provide their damages disclosures in any way, nor did they provide an expert disclosure of Mr. Gluhaich compliant

with NRCP 16.1. *Id.* Rather, Plaintiffs stated that Defendants "are granted an open extension for submitting any expert reports rebutting the opinions of Mr. Gluhaich until [they] have received Plaintiffs' amended disclosure, deposed Mr. Gluhaich, and provided any rebuttal expert(s) with sufficient opportunity to review that material and prepare rebuttal report(s)." *Id.* Plaintiffs also stated that the amended expert witness disclosure would be tendered that day. *Id.*

45. However, Plaintiffs did not provide any amended expert disclosure that day or at any time thereafter.

This Court's January 10, 2017, Hearing

46. On January 10, 2017, this Court held a hearing on Defendants' motion for partial summary judgment on Plaintiffs' overreaching consequential damages, which Messrs. Willard and Wooley personally attended. (January 10, 2017, transcript).

47. At the hearing, in pertinent part, Defendants' counsel informed this Court that Defendants had never received a damages computation from the Plaintiffs pursuant to NRCP 16.1, despite Defendants' many demands. *Id.* at 18. Plaintiffs' counsel attempted to claim that Plaintiffs' interrogatory responses satisfied Plaintiffs' requirements. *Id.* at 42-43. But Plaintiffs' counsel admitted, in open court, that "with respect to Willard, they do not" have an up-to-date, clear picture of Plaintiffs' damages claims. *Id.*

48. Plaintiffs' counsel also represented to this Court that Wooley's damages disclosures to Defendants were complete and up-to-date. *Id.* This was a misrepresentation, as Wooley had never provided Defendants with any NRCP 16.1 damages disclosures, and certainly had not provided any updated disclosures since the court-ordered discovery response in July of 2015. Further, the December 2016 damages spreadsheet was for use in settlement negotiations only per Wooley's counsel's own words, and therefore was not a disclosure in this litigation that could be utilized as contemplated by the Nevada Rules of Civil Procedure. (Exhibit 12 to Defendants' Motion). Defendants' counsel apprised this Court of this fact during the hearing. (January 10, 2017, transcript).

49. Upon orally granting Defendants' motion, this Court also ordered that "the Court enters a case management order that directs the plaintiffs to serve, within 15 days after the entry of the summary judgment, an updated 16.1 damages disclosure." *Id.* at 68.

The February 9, 2017, Stipulation and Order

50. In spite of the rapidly impending trial date (at the time, May 2, 2017) and close of discovery (at the time, March 2, 2017), Plaintiffs did not provide Defendants with any damages disclosures or otherwise supplement or update their discovery responses in any way. Nor did Plaintiffs supplement their improper disclosure of Mr. Gluhaich or properly disclose any expert.

51. On February 3, 2017, Defendants wrote Plaintiffs, prefacing their letter by stating that "as of the date of this letter, we have less than thirty (30) days to complete discovery, less than sixty (60) days to fully-brief and submit dispositive motions to the Court for decision and less than three months until the current trial date." (Exhibit 16 to Defendants' Motion). Defendants wrote this letter to inform Plaintiffs that because of their failure to comply with their obligations, Defendants would not be able to timely complete discovery or submit dispositive motions, all to Defendants' prejudice, and to inform Plaintiffs that their conduct necessitated yet another continuance of the trial date. *Id.*

52. In the letter, Defendants first addressed Plaintiffs' obstinate refusal to comply with expert disclosure requirements. *Id.* Defendants reminded Plaintiffs that Plaintiffs "were indisputably aware of the fact that Plaintiffs' disclosures did not comply with the Nevada Rules of Civil Procedure at the time [they] served the deficient disclosure or immediately thereafter, as demonstrated by [the parties'] December 5, 2016, telephonic conversation." *Id.* However, despite Defendants having granted Plaintiffs an extension, Plaintiffs had not even attempted to comply with the Nevada Rules of Civil Procedure more than two months after the deadline, "without any justification whatsoever." *Id.*

53. Defendants further informed Plaintiffs that their "failure to comply with the Nevada Rules of Civil Procedure in the first instance, or to rectify their failure by providing an

amended disclosure, is severely prejudicing Defendants." *Id.* With the close of discovery being one month away, "regardless of what Plaintiffs do at this point, this discovery deadline would need to be extended to enable the Defendants to complete discovery and disclose rebuttal experts in the time permitted by the rule, the parties' joint case conference report, and the stipulation and order on file with the Court." *Id.*

54. Defendants also addressed Plaintiffs' continued failure to provide Defendants with an NRCP 16.1 damages computation. *Id.* Defendants stated that it would be "patently prejudicial to Defendants to receive Plaintiffs' damages model within mere days of the close of discovery," and it would be impossible for Defendants' expert to opine on any new damages theories under the current discovery deadlines if Plaintiffs were to seek any additional or different types of damages. *Id.*

55. Finally, Defendants requested that Plaintiffs also provide other outstanding discovery, stating that Plaintiffs "have been promising to disclose these documents for more than 10 months, but have yet to do so." *Id.*

56. Based on these issues, Defendants asked for a continuance of the trial date so that Plaintiffs could comply with their obligations such that Defendants could receive time to prepare their defenses in the timeline entitled to them by the Nevada Rules of Civil Procedure and the parties' agreements. *Id.*

57. Plaintiffs agreed to a third trial continuance, and on February 9, 2017, the parties signed a stipulation which contained several express recitals and stipulations regarding Plaintiffs' ongoing failure to comply with discovery obligations.

58. First, Plaintiffs agreed that they never properly disclosed Mr. Gluhaich and that this conduct had been prejudicial to Defendants:

> 4. On December 2, 2016, Plaintiffs disclosed Dan Gluhaich as a non-retained expert. Plaintiffs' disclosure of Mr. Gluhaich indicated that Mr. Gluhaich would offer testimony regarding twelve separate subject matters and included Mr. Gluhaich's resume, but did not include "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B).

> 5. Because Plaintiffs' disclosure of Mr. Gluhaich did not include a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants have been unable to conduct a meaningful deposition of Mr. Gluhaich or to retain experts to rebut Mr. Gluhaich's opinions, because those opinions remain unknown to Defendants.
>
> 6. Following receipt of Plaintiffs' supplemental disclosure of Mr. Gluhaich, if any, which includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants intend to depose Mr. Gluhaich and retain experts to rebut his opinions.
>
> 10. ...[B]ecause Plaintiffs have not yet provided an expert disclosure of Mr. Gluhaich that includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants will be unable to complete the deposition of Mr. Gluhaich or to retain and disclose experts to rebut Mr. Gluhaich's opinions within the time currently allowed for discovery.

(February 9, 2017, Stipulation and Order).

59. Second, Plaintiffs stipulated that they had not properly provided their NRCP 16.1 damages disclosures:

> 7. On January 10, 2017, the parties appeared in this Court for a hearing on Defendants' Motion for Partial Summary Judgment. At the hearing, the parties discussed with the Court Plaintiffs' obligation to provide, pursuant to NRCP 16.1(a)(1)(C), "[a] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered." (January 10, 2017 Hearing Transcript at 18, 42-43 and 61-62). Plaintiffs conceded at the hearing that they have not yet provided Defendants with a complete damages disclosure pursuant to NRCP 16.1(a)(1)(C), and the Court ordered Plaintiffs "to serve, within 15 days after the entry of the summary judgment, an updated 16.1 damage disclosure." *Id.* at 68.
>
> 8. Upon receipt of Plaintiffs' NRCP 16.1 damages disclosure, Defendants intend to have Michelle Salazar supplement her initial expert report to include any opinions about any new or revised damages claims or calculations submitted by Plaintiffs, and Defendants may also need to conduct additional fact discovery on any new or revised damages claims or calculations submitted by Plaintiffs.

> 9. Discovery in this matter currently is scheduled to close on March 2, 2017, and dispositive motions must be filed and submitted for decision no later than March 31, 2017.
>
> 10. Because Plaintiffs have not yet provided a complete NRCP 16.1 damages disclosure, Defendants will not be able to complete necessary fact discovery on Plaintiffs' damages, or to disclose an updated expert report of Michelle Salazar within the time currently allowed for discovery....

Id.

60. Plaintiffs stipulated that this Court should enter an order which, in pertinent part, requires "Plaintiffs to serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26 within thirty (30) days of the date of the Order approving this Stipulation." *Id.*

61. Plaintiffs also stipulated to other pertinent deadlines:

> 3. The deadline for Defendants to serve a supplemental expert disclosure of Michelle Salazar providing any opinions about any new or revised damages claims or calculations submitted by Plaintiffs shall be extended until sixty (60) days before the close of discovery....
>
> 5. The deadline for Defendants to serve any rebuttal expert disclosures shall be extended until forty-five (45) days after Plaintiffs serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26.

Id.

62. The Stipulation also included a certification from counsel that "[u]ndersigned counsel certifies that their respective clients have been advised that a stipulation for continuance is to be submitted on their behalf and that the parties have no objection thereto." *Id.*

63. This Court entered an Order consistent with the stipulation on February 9, 2017. *Id.*

64. However, Plaintiffs did nothing as required by the Stipulation since the entry of this Order or the stipulation of the parties to rectify their failure to meet their outstanding discovery obligations.

65. The parties set a trial date of January 29, 2018, meaning that, per the Stipulation and Order, discovery was set to close on November 15, 2017.

This Court's May 30, 2017, Order

66. On May 30, 2017, this Court entered an Order granting Defendants' motion for partial summary judgment. (Order).

67. In pertinent part, this Court stated that "[i]t is further ordered Plaintiffs shall serve, within fifteen (15) days of entry of this order, an updated NRCP 16.1 damage disclosure." *Id.*

68. Again, Plaintiffs completely ignored the requirements and obligations imposed by this order. They have failed to both properly disclose Mr. Gluhaich or to provide damages computations, despite the express requirements of the NRCP and this Court's Orders.

Plaintiffs' Motions for Summary Judgment

69. After three years of obstinate refusal to provide Defendants with an NRCP 16.1 damages calculation or to supplement any damages calculations, and after nearly one year of refusing to comply with the requirements to properly disclose an expert, Plaintiffs filed motions for summary judgment in which they requested brand new, never-disclosed types, categories, and amounts of damages with only four weeks remaining in discovery. (Motions for Summary Judgment).

70. Further, their calculations were based upon opinions of Mr. Gluhaich, an expert witness who was never properly disclosed, and who primarily based his opinions on appraisals that were also never disclosed. *Id.*

71. These Motions were filed with only four weeks remaining in discovery—putting Defendants in the exact same predicament that they were placed in February of 2017—Defendants could not engage in the discovery (fact and expert) necessary to adequately respond to Plaintiffs' brand new information, untimely disclosures, and new requests for relief. (Exhibit 16 to Defendants' Motion; February 9, 2017, Stipulation and Order).

72. Plaintiffs' new damages and new expert opinions were all based upon information that was in Plaintiffs' possession throughout this case, meaning that there was no reason that Plaintiffs could not have timely disclosed a computation of their damages and the documents on which such computations are based.

Willard's Motion

73. In Willard's Motion, Willard sought more than triple the amount of damages (nearly $40 million more) than he sought in the complaint and ostensibly throughout this case.

74. Willard also had a brand new, different basis for his claimed "rent" damages: the liquidated damages provision in the Lease. Unlike the damages sought in his Complaint, the liquidated damages clause contains a variable—reasonable rental value—that would necessarily require Willard to provide expert opinion to support his request and meet his burden of proof. (Willard Lease; Willard Motion).

75. Willard also had a brand new claim for diminution in value damages that would also require Willard to offer expert opinions to meet his burden of proof. (Willard's Motion for Summary Judgment).

76. Default interest was a brand new component of Willard's claimed damages. *Id.*

77. The property-related damages now had a different purported value and amount. *Id.*

78. Willard's damages were based upon the opinions of Mr. Gluhaich, an undisclosed expert witness, and therefore Defendants did not have the chance to explore Mr. Gluhaich's opinions or rebut them as they are expressly entitled to do under Nevada law. *Id.*

79. Willard and his purported expert witness relied upon appraisals from 2008 and 2014 which were never disclosed in this litigation, despite Willard's NRCP 16.1 and NRCP 26(e) obligations and affirmative discovery requests served by Defendants. *See also* (Exhibit 17 to Defendants' Motion ("Please produce any and all appraisals for the Property from January 1, 2012 through present.")).

Wooley's Motion

80. Wooley sought nearly double the amount of damages that he sought in his complaint and ostensibly throughout this case. (Wooley Motion).

81. Wooley used different bases for his claimed "rent" damages. Unlike the damages sought in his Complaint, the liquidated damages clause contains a variable—reasonable rental value—that would necessarily require Wooley to introduce an expert opinion to meet his burden of proof, which Defendants would be entitled to rebut under Nevada law. (*Id.*; Exhibit 19 to Defendants' Motion). Wooley's basis for these damages was also different because Mr. Wooley had testified at his deposition that he had not yet terminated the lease and that it was ongoing, yet termination is a prerequisite to utilizing the liquidated damages formula per the parties' lease. (Exhibit 18 to Defendants' Motion; Exhibit 19 to Defendants' Motion). Thus, Wooley was proceeding on an entirely new theory.

82. Default interest was also a brand new component of Wooley's claimed damages. (Wooley Motion).

83. The property-related damages were based in part upon new damages and documents that were not disclosed to Defendants. *Id.*

84. Wooley's damages were based upon the opinions of Mr. Gluhaich, an undisclosed expert, and therefore Defendants did not have the chance to explore Mr. Gluhaich's opinions or rebut them as they were entitled to do. *Id.*; (February 9, 2017, Stipulation and Order).

85. Wooley and his purported expert relied upon an appraisal to establish "value" that was not previously disclosed in this litigation, despite Wooley's NRCP 16.1 and NRCP 26(e) obligations. (Exhibit 18 to Defendants' Motion (wherein Wooley stated that he had an appraisal performed when he bought the property, but had not produced that to his lawyer)).

Timing of the Motions

86. At this point in discovery, Defendants had obviously only been able to prepare defenses to the claimed bases for damages that Plaintiffs asserted in the Complaint and Interrogatory responses, not Plaintiffs' brand new, previously undisclosed, bases for damages.

87. This timing of these Motions undeniably deprived Defendants of the process that the parties expressly agreed was necessary to rebut any properly-disclosed expert opinions or properly-disclosed NRCP 16.1 damages calculations, as ordered by this Court. (February 9, 2017, Stipulation and Order).

88. Indeed, the conduct discussed herein is part of a larger pattern of Plaintiffs to ignore their discovery obligations. Defendants have been forced to file two motions to compel and a motion for contempt and sanctions, simply to have Plaintiffs comply with their discovery obligations.

89. Defendants have been required repeatedly to go to extraordinary lengths to attempt to force Plaintiffs to comply with basic obligations and deadlines imposed by the NRCP. (Exhibits 20-23 to Defendants' Motion).

90. This Court has also issued several Orders requiring Plaintiffs to meet their discovery obligations, but Plaintiffs have blatantly ignored those Orders.

91. Plaintiffs never submitted their Motions for Summary Judgment by the December 15, 2017 deadline to submit dispositive motions, or any time thereafter.

This Court's December 12, 2017, Hearing

92. On November 15, 2017, Defendants filed, *inter alia*, Defendants' Motion for Sanctions.[3]

93. Therein, Defendants requested that this Court dismiss Plaintiffs' case with prejudice as a sanction for Plaintiffs' discovery violations.

[3]Defendants had also filed a Motion to Strike/Motion in Limine to Preclude Daniel Gluhaich as an expert witness, and a Motion for Partial Summary Judgment on Plaintiffs' diminution in value claims. This Court has ruled on those Motions in other orders.

94. On December 6, 2017, Plaintiffs' filed a Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions.

95. At the Pre-Trial Status Conference on December 12, 2017, this Court granted Plaintiffs' Request for Extension and directed Plaintiffs to respond no later than Monday, December 18, 2017, at 10 AM.[4] This Court further directed Defendants to reply no later than January 8, 2018, and set the parties' Motions for oral argument on January 12, 2018.

96. This Court also admonished Plaintiffs that "you need to know going into these oppositions, that I'm very seriously considering granting all of it." (December 12, 2017, transcript).

97. This Court also admonished Plaintiffs that "you know going into this motion for sanctions that you're—I haven't decided it, but I need to see compelling opposition not to grant it." *Id.*

98. However, Plaintiffs did not file any opposition to Defendants' Motions by December 18 or any time thereafter, nor did Plaintiffs request any further extension. In fact, this Court and Defendants' counsel have not heard anything from Plaintiffs or their counsel since the December 12, 2017, hearing.

99. Defendants filed a notice of non-opposition to their Motions and request for submission of their Motions on December 18.

CONCLUSIONS OF LAW

Legal standard

100. NRCP 16.1(a)(1)(A)(C) provides that "a party must, without awaiting a discovery request, provide to other parties...[a] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34

[4]This Court inquired as to why Plaintiffs failed to oppose Defendants' Motions. Mr. Moquin informed this Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained that he is a sole practitioner without access to an IT department.

the documents or other evidentiary matter, not privileged or protected from disclosure, on which such a computation is based, including materials bearing on the nature and extent of injuries suffered...." "The use of the word 'must' means that the rule's requirements are mandatory." *Vanguard Piping v. Eighth Jud. Dist. Ct.*, 129 Nev. ___, ___, 309 P.3d 1017, 1020 (2013) (discussing the NRCP 16.1(a)(1)(D) requirements).

101. Further, "the rule requires a computation supported by documents.... A plaintiff is required to provide its assessment of damages in its initial disclosure in light of the information currently available to it in sufficient detail so as to enable each defendant to understand the contours of its potential exposure and make informed decisions as to settlement and discovery." 10 Fed. Proc., L. Ed. § 26:44 (discussing FRCP 26); *see generally Vanguard Piping*, 129 Nev. at ___, 309 P.3d at 1020 ("Because of the similarity in the language, federal cases interpreting [the FRCP corollary to NRCP 16.1(A)(1)(D)] are strong persuasive authority."). Indeed, it is the plaintiff's burden to prove damages, *see generally Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543-44 (1994) ("The party seeking damages has the burden of proving the fact that he was damaged and the amount thereof."), and "the plaintiff cannot shift to the defendant the burden of attempting to determine the amount of the plaintiff's damages." 10 Fed. Proc., L. Ed. § 26:44.

102. Also pertinent, NRCP 16.1(a)(2)(B) requires that, with regard to a non-retained expert witness, a party must disclose, *inter alia*, a summary of the facts and opinions to which the witness is expected to testify. References to broad categories as to what the expert will testify are insufficient. *See Jones v. Colorado Cas. Ins. Co.*, 2015 WL 6123125, at *3 (D. Ariz. 2015).

103. Further, NRCP 26(e) requires that:

> A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired, if ordered by the court or in the following circumstances:

> (1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.
>
> (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

104. Failure to comply with NRCP 16.1's requirements shall result in sanctions. Pursuant to NRCP 16.1(e)(3):

> If an attorney fails to reasonably comply with **any** provision in [NRCP 16.1], or if an attorney or a party fails to comply with an **order** entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, **shall** impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:
>
> (A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);
>
> (B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).

(Emphases added).

105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

106. Further, NRCP 37(c)(1) provides that "[a] party that without substantial justification fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial...any witness or information not so disclosed." NRCP 37(c)(1) also provides that "[i]n addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C)."

107. Similarly, pursuant to NRCP 41(b), "[f]or failure of the plaintiff to comply with [the Nevada Rules of Civil Procedure] or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant."

108. In addition to the rule-based authority discussed herein, the Nevada Supreme Court has also recognized that "the court has inherent power to enter defaults and dismiss actions for abusive litigation practices." *Blanco v. Blanco*, 129 Nev. ___, ___, 311 P.3d 1170, 1174 (2013).

109. The Nevada Supreme Court has also expressly held that "the factual nature of the underlying case is not an appropriate measure to evaluate whether a [case] should be dismissed for violations of court rules and/or orders." *Huckabay Props. v. NC Auto Parts*, 130 Nev. ___, ___, 322 P.3d 429, 433 (2014) (discussing this in the context of dismissing an appeal, and also disapproving of prior case law "to the extent it indicates that a fact-based assessment of the underlying civil action should be made before determining whether to dismiss an appeal on procedural grounds.").

110. Finally, pursuant to DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same.

Plaintiffs' Conduct Demands Dismissal with Prejudice

111. When considering the issuance of dismissal with prejudice as a sanction, the Nevada Supreme Court has held that "[p]rocedural due process considerations require that such case-concluding discovery sanctions be just and that they relate to the claims at issue in the violated discovery order." *Blanco*, 129 Nev. at ___, 311 P.3d at 1174.

112. Further, the Court must consider pertinent factors, including the extent of the offending party's willfulness, whether the non-offending party would be prejudiced by imposition of a lesser sanction, whether dismissal is too severe for the particular discovery abuse, the feasibility and fairness of less severe sanctions, the policy favoring adjudication of cases on their merits, and the need for deterring similar abusive conduct. *Id.* Dismissal should only occur in the most extreme of cases. *Id.*

113. However, district courts are not required to consider every factor, so long as the district court's analysis is thoughtfully performed. *See generally Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990).

114. Here, the factors readily demonstrate that dismissal with prejudice is warranted, and that there is no due process violation in so doing.

Plaintiffs did not oppose Defendants' motion or any of the points discussed therein.

115. It must be emphasized as a threshold matter that Plaintiffs never opposed Defendants' Motion.

116. Under DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same.

117. Thus, this Court finds that Plaintiffs' failure to file an opposition constitutes both an admission that the Motion is meritorious and Plaintiffs' consent to granting Defendants' Motion.

118. However, separate from this consideration, good cause exists to dismiss this case.

Case-concluding discovery sanctions are just and relate to the claims at issue

119. Plaintiffs' failure to provide damages disclosures are so central to this litigation, and to Defendants' rights and ability to defend this case, that dismissal of the entire case is necessary.

120. Plaintiffs have also completely failed to properly disclose an expert witness, waiting instead until the virtual end of discovery to attempt to utilize an undisclosed expert witness to support their Motions for Summary Judgment without complying with the requirements of the Nevada Rules of Civil Procedure, when it was too late for Defendants to disclose rebuttal expert testimony or otherwise defend against Plaintiffs' claims for damages.

121. Plaintiffs have also ignored or failed to comply with multiple separate discovery obligations throughout this case, forcing Defendants to repeatedly file motions to compel, and necessitating that the trial and discovery deadlines be extended on three occasions to accommodate for Plaintiffs' continued noncompliance.

122. Further, Plaintiffs have ignored this Court's express admonition to Plaintiffs that this Court was "seriously considering" dismissal and that Plaintiff's Oppositions would need to be "compelling." Plaintiffs did not even attempt to file oppositions, even after this warning.

123. Indeed, Plaintiffs have exhibited complete disregard for this Court's Orders, deadlines imposed by this Court, and the judicial process in general.

Plaintiffs' violations are willful

124. Plaintiffs' violations are willful. In addition to the plain language of NRCP 16.1, Plaintiffs have been on direct notice for three years that they have not complied with NRCP 16.1(a)(1)(C), yet have not attempted to rectify their wrongdoing. *Supra*.

125. This Court has ordered Plaintiffs to provide their damages disclosures, but Plaintiffs blatantly disregarded these orders. (January 10, 2017, Transcript at 68; May 30, 2017, Order); *see also Perez v. Siragusa*, 2008 WL 2704402, at *4 (E.D.N.Y. July 3, 2008) (dismissal under FRCP 37 and 41, noting that "[n]on-compliance with discovery orders will be deemed

willful when the court's orders have been clear, when the party has understood them and when the party's noncompliance is not due to factors beyond the party's control.").

126. Plaintiffs acknowledged in two stipulations that they have not complied with NRCP 16.1, yet have not even attempted to do so, despite promising and being ordered to comply. *See, e.g.*, (January 10, 2017, Transcript (for Willard); February 9, 2017, Stipulation and Order; May 2, 2016, Stipulation and Order).

127. Further, Wooley misrepresented to this Court that he had provided complete and up-to-date disclosures to Defendants when he had not. (January 10, 2017, Transcript). If anything, Wooley had only provided a spreadsheet that was, per Wooley's own words, for use in "settlement negotiations." *See* NRS 48.105(1). Defendants have informed Wooley repeatedly, including in open court, that this document provided for settlement negotiations does not equate to a disclosure, and Plaintiffs have never authorized Defendants to use that spreadsheet for litigation purposes in any manner. *See, e.g.*, (January 10, 2017, Transcript 62).

128. Plaintiffs' bad faith motives in waiting to ambush Defendants are also plainly evidenced by their eleventh-hour Motions requesting brand-new, different, categories and amounts of damages for double and triple what was originally sought, while such alleged damages were based upon information that has been in Plaintiffs' possession for the entire pendency of this case. Plaintiffs' strategic decision to only disclose their damages in their Motions for Summary Judgment prejudiced Defendants by depriving them of the opportunity to defend against damages that had never been previously disclosed.

129. Plaintiffs' failure to properly disclose an expert witness is similarly willful. Plaintiffs acknowledged immediately after the initial purported "disclosure" that the disclosure did not comply with Nevada law. *See* (December 5, 2016, email (three days after disclosures due) (wherein Plaintiffs' counsel stated that "[Defendants] agreed to allow Plaintiffs to provide an amended witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich will be testifying...."), Exhibit 12 to Defendants' Motion; Exhibits 14 and to Defendants' Motion).

130. Plaintiffs agreed that they failed to comply with NRCP 16.1(a)(2)(B) and agreed to the entry of a Court order requiring them to properly disclose an expert by March 11, 2017. (February 9, 2017, Stipulation and Order).

131. Yet, Plaintiffs did not even attempt to provide a proper disclosure of Mr. Gluhaich at any time in 2017.

132. Then, on October 17 and 18, 2017, less than four weeks prior to the close of discovery, Plaintiffs filed Motions for Summary Judgment, referring to Mr. Gluhaich as their "designated expert," (Willard Motion at 19-20; Wooley Motion at 12-13), without even acknowledging their noncompliance, much less providing justification for it.

133. Further, even a cursory review of Mr. Gluhaich's Affidavits in support of the Motions demonstrates that the purported facts and opinions that he provided could have been timely disclosed in December of 2016, further demonstrating that there was no justification other than willful noncompliance. (Gluhaich Affidavit re: Willard (relying exclusively on events that occurred in 2014 or earlier); Gluhaich Affidavit re: Wooley (relying exclusively on events that occurred in 2015 or earlier)).

134. These Motions and Mr. Gluhaich's Affidavits were filed at a point in the case where it was too late for Defendants to properly explore or rebut Mr. Gluhaich's conclusions and the bases therefor, a fact that Plaintiffs acknowledged in February with approximately four weeks left in discovery. (February 9, 2017, Stipulation and Order).

135. In addition, it is clear that Plaintiffs' failure to disclose the appraisals upon which many of their calculations were based was also willful.

136. With respect to Willard, Willard relies upon an appraisal from 2008 to determine the purported "original" fair market value of the property. (Willard Motion at 19). According to Willard, this appraisal was "commissioned in 2008 by the Willard Plaintiffs." *Id.* Indeed, Mr. Gluhaich avers that "in September 2008 Willard commissioned an appraisal of the Virginia Property...from CB Richard Ellis..., a copy of which was sent directly to me by Jason Buckholz of CBRE on October 17, 2008." (Gluhaich Aff. re: Willard ¶5). Willard also relies

upon, *inter alia*, an appraisal from 2014 to establish the purported "fair rental value" of the property in 2014 for purposes of his newly-sought liquidated damages relief, and the purported "post-breach" value of the property in 2014. *Id.* at 19-20. Mr. Gluhaich averred that "The 2014 Appraisal was issued on February 11, 2014," and he "received [this appraisal] directly from Rob Cashell." (Gluhaich Aff. re: Willard ¶15). Mr. Gluhaich's purported opinions were heavily based on these appraisals. *Id.* ¶9 ("In my opinion, the 2008 Appraisal presents a thorough, detailed, professional, and highly compelling analysis of the market value of the Virginia Property as leased."); ¶16 (relying on the appraisal to opine on the purported "as-is" fair market value); ¶17 (relying upon the appraisal to establish the purported fair market rental value). However, these appraisals were never disclosed to Defendants at any time before the present motion. (Decl. of B. Irvine, Exhibit 1 to Willard Opposition). This is despite the fact that Defendants requested Willard to "produce any and all appraisals for the Property from January 1, 2012, through present," (Exhibit 17 to Defendants' Motion), and that Willard had an obligation to disclose this material pursuant to NRCP 16.1(a)(1)(C) and NRCP 26. Given that Willard freely admits that these appraisals were commissioned prior to the commencement of the case, and were in his possession, this is clearly willful omission.

137. With respect to Wooley, Wooley relies upon an appraisal that the Wooley Plaintiffs commissioned in August 2006. (Wooley Motion at 2). This appraisal is the basis for Gluhaich's opinion as to the "original" fair market value in Wooley's diminution in value claim. (Gluhaich Aff. Re: Wooley ("In my opinion, the 2006 Appraisal presents a thorough, detailed, professional, and highly compelling analysis of the market value of the Highway 50 Property as leased.")). Defendants even asked about the appraisal during Wooley's deposition. (Exhibit 18 to Defendants' Motion at 125 (wherein Wooley stated that he had not given this appraisal to his lawyer)). Yet, this appraisal was never disclosed to Defendants until Wooley filed his Motion, which is a willful omission and is in complete derogation of Wooley's NRCP 16.1 and NRCP 26 obligations.

138. Plaintiffs' strategic decision to wait to disclose both the appraisals and the opinions of Mr. Gluhaich until they filed their Motions for Summary Judgment prejudiced Defendants by depriving them of the opportunity to conduct discovery regarding the appraisals, to conduct an expert deposition of Mr. Gluhaich or to prepare and disclose expert witnesses to rebut the opinions of Mr. Gluhaich.

139. Finally, as noted, this is part of a larger pattern and practice by Plaintiffs to disregard their discovery obligations at every point in this litigation. (Motions to Compel).

140. Indeed, Plaintiffs completely failed to even respond to Defendants' Motion for Sanctions, even when this Court gave them an additional extension and expressly warned them, in open court, that "you need to know going into these oppositions, that I'm very seriously considering granting all of it," and "you know going into this motion for sanctions that you're—I haven't decided it, but I need to see compelling opposition not to grant it." (December 12, 2017, transcript).

Defendants have been prejudiced by Plaintiffs' conduct and would be prejudiced by the imposition of a lesser sanction

141. Plaintiffs' repeated and willful delay in providing necessary information to Defendants has necessarily prejudiced Defendants. *Cf. generally Foster v. Dingwall*, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010) (concluding that "appellants' continued discovery abuses and failure to comply with the district court's first sanction order evidences their willful and recalcitrant disregard of the judicial process, which presumably prejudiced [the non-offending party"); *Hamlett v. Reynolds*, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998) (cited in *Foster* as "upholding the district court's strike order where the defaulting party's 'constant failure to follow [the court's] orders was unexplained and unwarranted'"); *In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1236 (9th Cir.2006) (cited in *Foster* as "holding that, with respect to discovery abuses, '[p]rejudice from unreasonable delay is presumed' and failure to comply with court orders mandating discovery 'is sufficient prejudice'"); *Perez*, 2008 WL 2704402 at *6 ("The behavior exhibited by plaintiffs has prejudiced defendants by delaying the

resolution of the claims and increasing the costs of litigation. The parties have not made any progress with discovery or moved closer to trial readiness. This factor...weighs in favor of dismissing the action.").

142. In fact, this is Plaintiffs' second case against Defendants based on the same set of facts.

143. Plaintiffs attempted to prosecute this case against Defendants in California, which was dismissed for a lack of personal jurisdiction.

144. Defendants are entitled to resolution, not to Plaintiffs languidly holding Defendants in litigation while simultaneously failing to meet their obligations under the NRCP to provide threshold information necessary to defend this case and to comply with the other obligations imposed by the NRCP.

145. Further, Plaintiffs' collective new requests and bases are not harmless additions: they would require Defendants to engage in additional fact discovery, retain direct and rebuttal experts, take depositions, re-open the briefing schedule, and again delay the trial for tasks that could, and should, have been accomplished during a discovery period that was already extended three times to account for Plaintiffs' continued noncompliance.

Dismissal is not too severe for these discovery abuses, and lesser sanctions are not feasible or fair

146. Plaintiffs' damages disclosures are central to this case, and dismissal is not too severe for Plaintiffs' repeated and willful noncompliance with Court orders and with Nevada law.

147. The Plaintiffs have been sanctioned for other discovery violations, (Order Granting Motion to Compel), yet remain undeterred, demonstrating that less severe sanctions have had no effect on Plaintiffs' recalcitrant conduct.

148. For example, in the context of granting Defendants' Motion to Compel Discovery Responses, this Court ordered Plaintiffs to pay Defendants' reasonable expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

149. Not only have Plaintiffs not ever paid these expenses, but it is incontrovertible that this Court's imposition of monetary sanctions on Plaintiffs in 2015 had absolutely no deterrent effect on Plaintiffs' conduct, as Plaintiffs continued to commit discovery violations and continued to violate and ignore this Court's orders well after the issuance of the July 1, 2015, Order, completely undeterred by the imposition of monetary sanctions.

150. Further, Plaintiffs' conduct has already caused three continuances of the trial date, all to accommodate for Plaintiffs' continued disregard for Nevada discovery procedure. (Stipulations and Orders).

151. Given that this Court has already issued lesser sanctions, ordered continuances, and given Plaintiffs repeated admonitions about complying with deadlines and their NRCP obligations, all to no avail, it is clear that lesser sanctions have had no effect on Plaintiffs' conduct, and the issuance of lesser sanctions would only serve to encourage Plaintiffs' misconduct.

152. The fact that this Court granted Plaintiffs an additional extension to oppose Defendants' Motions, including their Motion for Sanctions, and Plaintiffs failed to do so without any excuse whatsoever further demonstrates that this Court's orders, and any lesser sanctions, have no effect on Plaintiffs' conduct. Given Plaintiffs' repeated failure to heed the court's warnings in the past, issuing additional warnings would be futile.

153. Nor would a less severe sanction be fair to Defendants, who have been continually prejudiced by Plaintiffs' willful disregard of their obligations despite their continued efforts to work with Plaintiffs and provide extensions to Plaintiffs.

154. Additionally, it must be noted that the Nevada Supreme Court has noted that "a party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or omissions led to the dismissal." *Huckabay Props v. NC Auto Parts*, 130 Nev. ___, ___, 322 P.3d 429, 432 (2014) (also discussing that "[t]he United States Supreme Court has recognized that when an action is dismissed for failure to comply with court rules, the litigant cannot seek a do-over of their dismissed action based on arguments that dismissal is too harsh a penalty for

counsel's unexcused conduct, as to do so would offend general agency principles"); *see also, e.g., Link v. Wabash R. Co.*, 370 U.S. 626, 634 n.10 (1962) ("Surely if a criminal defendant may be convicted because he did not have the presence of mind to repudiate his attorney's conduct in the course of a trial, a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit. And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant.").

The policy favoring adjudication on the merits does not militate against dismissal

155. Although there is a policy favoring adjudication on the merits, Plaintiffs themselves have frustrated this policy by refusing to provide Defendants with their damages calculations or proper expert disclosures. Defendants have not frustrated this policy; instead, the record is clear that Defendants, and this Court, have repeatedly attempted to force Plaintiffs to comply with basic discovery obligations, to no avail.

156. Indeed, Defendants have served multiple rounds of written discovery upon Plaintiffs, in an attempt to obtain basic information on Plaintiffs' damages; have taken multiple depositions, and have been requesting compliant disclosures throughout this case so that they can address the merits. (Exhibits 24-35 of Defendants' Motion).

157. Plaintiffs should not be permitted to hide behind the policy of adjudicating cases on the merits when it is they who have frustrated this policy throughout the litigation. Defendants cannot reach the merits when they must spend the entire case asking Plaintiffs for threshold information and receiving no meaningful responses.

158. As the Nevada Supreme Court has held, the policy favoring adjudication on the merits "is not boundless and must be weighed against other policy considerations, including the public's interest in expeditious...resolution, which coincides with the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing party; and

administration concerns, such as the court's need to manage its large and growing docket." *Huckabay Props v. NC Auto Parts*, 130 Nev. ___, ___, 322 P.3d 429, 432 (2014) (also holding, in the context of a dismissal of an appeal, that "a party cannot rely on the preference for deciding cases on the merits to the exclusion of all other policy considerations, and when an appellant fails to adhere to Nevada's appellate procedure.

159. Again, this is Plaintiffs' second time prosecuting this case against Defendants without undertaking the necessary conduct and requirements imposed by court rules to reach the merits.

Dismissal is required to deter similar abusive conduct

160. The need to deter similar abusive conduct also weighs heavily in favor of dismissal.

161. The discovery rules are in place for a reason, and are mandatory.

162. Compliance with this Court's Orders is also mandatory.

163. Yet, Plaintiffs have completely ignored multiple Orders from this Court, deadlines imposed by this Court, and their obligations pursuant to the Nevada Rules of Civil Procedure.

164. Plaintiffs have received multiple opportunities and extensions to rectify their noncompliance, but have not even attempted to do so.

165. If Plaintiffs are permitted to continue prosecuting this case without severe consequences, then this type of abusive litigation practice will continue to the prejudice of defending parties and will make a mockery of the Nevada Rules of Civil Procedure and court orders. *Cf. generally Foster*, 126 Nev. at 66, 227 P.3d at 1049 (noting that "[i]n light of appellants' repeated and continued abuses, the policy of adjudicating cases on the merits would not have been furthered in this case, and the ultimate sanctions were necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders."); *see also Langermann v. Prop. & Cas. Ins. Co.*, 2015 WL 4714512 at *5 (D. Nev. 2015) (failing "to

comply with a scheduling order is not harmless, and re-opening discovery after the expiration of the deadlines only encourages cavalier treatment of deadlines").

166. Plaintiffs' disregard for this Court's orders and docket, Nevada law, and Defendants' rights to prepare a defense necessitates dismissal.

Dismissal would not violate Plaintiffs' due process rights

167. There is also no issue of due process deprivation upon dismissal.

168. Plaintiffs' response to Defendants' Motions, including Defendants' Motion for Sanctions, was originally due on December 4, 2017.

169. There is no dispute that Plaintiffs were served with the Motions. (December 12, 2017, transcript).

170. Through extensions granted by Defendants, and ultimately this Court, Plaintiffs were given until December 18, 2017, to file Oppositions. *Id.*

171. Defendants were expressly warned that this Court was seriously considering dismissal, and that Plaintiffs' oppositions needed to be "compelling." *Id.*

172. However, Plaintiffs did not file any Opposition by that time or any time thereafter; nor did Plaintiffs request another extension.

173. Thus, Plaintiffs, in voluntarily choosing to not respond to Defendants' Motions, are not being deprived of any due process. *See* DCR 13(3); *Huckabay*, 130 Nev. at ___, 322 P.3d at 436. No evidentiary hearing was needed. *See Nevada Power Co. v. Fluor Illinois*, 108 Nev. 638 (1992) ("If a party against whom dismissal may be imposed raises a question of fact as to any of [the] factors [for dismissal], the court must allow the parties to address the relevant factors in an evidentiary hearing.").

174. Indeed, this Court held a hearing on December 12, 2017, which was attended by both of Plaintiffs' counsel. As Plaintiffs have not filed anything with this Court since that hearing, or otherwise provided any new information, there would be nothing new to discuss at another hearing. *See* DCR 13(3).

ORDER

Defendants' Motion for Sanctions is GRANTED.

Plaintiffs' claims against Defendants are DISMISSED WITH PREJUDICE.

DATED this 6th day of March, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 11525
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (775) 786-0131
Email: Jdesmond@dickinsonwright.com
Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

Attorneys for Defendants
Berry Hinckley Industries, and
Jerry Herbst

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 16th day of March, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

BRIAN IRVINE, ESQ.

DAVID O'MARA, ESQ.

BRIAN MOQUIN, ESQ.

JOHN DESMOND, ESQ.

ANJALI WEBSTER, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Heidi Brown

EXHIBIT “2”

EXHIBIT “2”

EXHIBIT “2”

FILED
Electronically
CV14-01712
2018-11-30 04:08:13 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7001598

Code:

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;

Defendants.
_____/

CASE NO. CV14-01712

DEPT. 6

ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants[1].
_____/

[1] On April 13, 2018, this Court entered its *Order of Dismissal of Claims of Wooley Plaintiffs with Prejudice*. On the same date, this Court entered its *Order Granting Defendants/ Counterclaimants' Motion to Dismiss Counterclaims*. All counterclaims were dismissed by said Order.

ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

Before this Court is Plaintiffs' Rule 60(b) Motion for Relief ("*Rule 60(b) Motion*") filed by PLAINTIFFS LARRY J. WILLARD, INDIVIDUALLY AND AS TRUSTEE OF THE LARRY JAMES WILLARD TRUST FUND AND OVERLAND DEVELOPMENT CORPORATION, A CALIFORNIA CORPORATION (collectively, "Willard" or the "Plaintiffs"), by and through counsel, Robertson, Johnson, Miller & Williamson.[2] By their *Rule 60(b) Motion*, Plaintiffs seek, pursuant to NRCP 60(b), to set aside: (a) this Court's January 4, 2018, *Order Granting Defendants/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich*; (b) this Court's January 4, 2018, *Order Granting Defendants' Motion for Sanctions*; and (c) this Court's March 6, 2018, *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions.*

Thereafter, DEFENDANTS BERRY-HINCKLEY INDUSTRIES ("BHI") AND JERRY HERBST (collectively, "Defendants"), filed their *Opposition to Rule 60(b) Motion for Relief,* by and through their counsel, Dickinson Wright, PLLC.

Plaintiffs then filed their *Reply in Support of the Willard Plaintiffs Rule 60(b) Motion for Relief* and the parties set the matter for hearing.

This Court carefully considered the papers submitted, the arguments of counsel, the entire court file herein, and is fully advised in the premises, and enters its order as follows.

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[2] Plaintiffs' former local counsel was David O'Mara of the O'Mara Law Firm, P.C. Mr. O'Mara filed a *Notice of Withdrawal of Local Counsel ("Notice"), on March 15, 2018.* Brian Moquin remains counsel of record as he has not withdrawn; however, he is not indicated as counsel filing the *Rule 60(b) Motion.*

FINDINGS OF FACT

The Court makes the following Findings of Fact:

Plaintiffs' Complaint

1. On August 8, 2014, Plaintiffs commenced this action by filing their *Complaint* against Defendants.[3] *Complaint*, generally.

2. By way of their *Complaint* and subsequent *First Amended Complaint,* Plaintiffs sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for $19,443,836.94, discounted by 4% per the lease to $15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. *First Amended Complaint* ("*FAC*"), generally.

3. Willard also sought several other categories of damages which have since been dismissed or withdrawn. May 30, 2017, *Order.*

Plaintiffs' Failure to Comply with the Nevada Rules of Civil Procedure and this Court's Orders

4. Plaintiffs failed to provide a compliant damages disclosure in this action.

5. Plaintiffs failed to provide a damages computation in their initial disclosures, as required under NRCP 16.1(a)(1)(C). *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* ("*Sanctions Order*") ¶ 12, and failed to provide damages computations at any time despite numerous demands on both Mr. Moquin and Mr. O'Mara. *Sanctions Order* ¶¶ 14-16, 25, 27-33, 39, 43-44 and 51-54.

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[3] Willard filed the initial complaint jointly with Edward E. Wooley and Judith A. Wooley, individually and as Trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). However, Defendants and Wooley entered into a settlement agreement and stipulation for dismissal. This Court entered its Order on April 13, 2018 dismissing Wooley's claims with prejudice.

6. Plaintiffs failed to provide complete and adequate responses to interrogatories requesting information about Plaintiffs' damages in the normal course of discovery.

7. Plaintiffs failed to provide complete and adequate responses to interrogatories in violation of this Court's *Order Granting Defendants' Motion to Compel* and failed to comply with this Court's *Order* ("*January Hearing Order*") issued after the parties discussed Plaintiffs' failure to provide damages computations at the January 10, 2017 hearing attended by Mr. Moquin, Mr. O'Mara and Mr. Willard. *Sanctions Order* ¶¶ 17-25.

8. The *January Hearing Order* required Plaintiffs to provide damages computations and supporting materials. *Sanctions Order* ¶¶ 46-49, 54, 59-64 and 67-68; *Defendants' Opposition Plaintiffs' Rule 60(b) Motion*, Ex. 2, *Transcript* of January 10, 2017 Hearing at pp. 61-63 and 68; *January Hearing Order.*

9. Plaintiffs failed to properly disclose Daniel Gluhaich as an expert witness as required by NRCP 16.1(a)(2). *Sanctions Order* ¶¶ 34-37.

10. In contravention of this Court's *January Hearing Order*, Plaintiffs failed to provide an amended disclosure of Mr. Gluhaich, although Defendants' counsel made multiple requests. *Sanctions Order* ¶¶ 38-45, ¶¶ 50-64.

Plaintiffs' Summary Judgment Motion

11. Pursuant to the February 9, 2017, *Stipulation and Order to Continue Trial,* discovery closed in mid-November, 2017.

12. On October 18, 2017, less than a month before the close of discovery, Plaintiffs filed their *Motion for Summary Judgment* asserting they were entitled, as a

matter of law, to more than triple the amount of damages alleged in and requested by their *First Amended Complaint*. *Sanctions Order* ¶¶ 69 and 73.

13. The damages asserted in Plaintiffs' *Motion for Summary Judgment* were not previously disclosed. The motion was also supported by previously undisclosed expert opinions and documents. *Sanctions Order* ¶¶ 74-79.

14. On November 13, 2017, Defendants filed their Opposition to Plaintiffs' *Motion for Summary Judgment*.

15. Plaintiffs' did not submit the *Motion for Summary Judgment* for decision.

Defendants' *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* and *Motion for Sanctions*

16. On November 14, 2017, Defendants filed their *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("*Motion to Strike*").

17. In the *Motion to Strike*, Defendants maintained this Court should preclude Plaintiffs from offering Mr. Gluhaich's testimony on the grounds: (a) Plaintiffs failed to adequately disclose Mr. Gluhaich as an expert because they failed to provide "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B); (b) the opinions offered by Mr. Gluhaich in support of Plaintiffs' *Motion for Summary Judgment* were based upon inadmissible hearsay and were based solely on the opinions of others; and (c) Mr. Gluhaich was not qualified to offer the opinions included in his Declaration attached to and filed in support of Plaintiffs' *Motion for Summary Judgment*.

18. On November 15, 2017, Defendants filed their *Motion for Sanctions ("Sanctions Motion")*.

19. In the *Sanctions Motion*, Defendants argued this Court should sanction Plaintiffs for their continued and intentional conduct in failing to comply with the Nevada Rules of Civil Procedure and this Court's orders requiring Plaintiffs to provide damages computations and full and adequate expert disclosures, and dismiss Plaintiffs' claims with prejudice, or, in the alternative, preclude Plaintiffs from seeking new damages or relying upon their undisclosed expert and appraisals.

20. Defendants agreed to give Plaintiffs' several extensions of time to oppose the *Motion to Strike* and *Sanctions Motion*, but no oppositions were filed.

21. On December 6, 2017, Plaintiffs requested relief from the Court by extension to respond until "December 7, 2017 at 4:29 p.m." *Sanctions Order* ¶ 94; *Plaintiffs' Request for a Brief Extension of Time ("Brief Extension Request")*, generally.

22. This Court held a status conference on December 12, 2017, attended by Defendants' counsel and Plaintiffs' counsel, Mr. Moquin and Mr. O'Mara. At the status conference, after observing Mr. Moquin, having significant dialog with Mr. Moquin, and over vehement objection by the Defendants' counsel, this Court granted *Plaintiffs' Brief Extension Request* plus granted more time than that requested. The Court directed Plaintiffs to respond to the outstanding motions no later than Monday, December 18, 2017, at 10:00 am. *Sanctions Order* ¶ 95.

23. Tis Court further directed Defendants to file their reply briefs no later than January 8, 2018. The Court set the parties' outstanding Motions for oral argument on January 12, 2018. *Sanctions Order* ¶ 96.

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24. This Court admonished Plaintiffs, stating "you need to know going into these oppositions, that I'm very seriously considering granting all of it . . . I haven't decided it, but I need to see compelling opposition not to grant it." *Opposition to Rule 60(b) Motion*, Ex. 3, December 12, 2017, *Transcript of Status Conference*, in part.

25. Plaintiffs did not file an opposition or response to the *Motion to Strike* or *Motion for Sanctions* by December 18, 2017 or any time thereafter, nor did Plaintiffs request any further extension.

26. This Court entered its *Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* on January 4, 2018 ("*Order Granting Motion to Strike*").

27. This Court entered its *Order Granting Defendants'/Counterclaimants' Motion for Sanctions* on January 4, 2018 ("*Order Granting Sanctions*").

28. This Court entered its *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* on March 6, 2018. ("*Sanctions Order*")[4]

Withdrawal of Local Counsel

29. Mr. O'Mara's *Notice of Withdrawal of Local Counsel, ("Notice")* filed March 15, 2018, states, "Mr. Moquin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such a response." *Notice,* 1.

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[4] The *Order Granting Sanctions* ordered sanctions and directed Defendants to "submit a Proposed Order granting *Defendants'/Counterclaimants' Motion for Sanctions*, including factual and legal analysis and discussion, to Department 6 within twenty (20) days of the date of this *Order* in accordance with WDCR 9." *Order Granting Sanctions, 4.* For purposes of the instant motion, the Court considers the *Order Granting Sanctions* and *Sanctions Order*, as one for purposes of the analysis herein.

30. The *Notice* describes the terms of retention of Mr. O'Mara as, "Undersigned Counsel was retained solely as local counsel, and provided Mr. Moquin with the necessary information related to the Court's filing requirement and timelines. Undersigned Counsel was retained only to provide services as directed by Mr. Moquin, and would be relieved of services if Mr. Moquin was removed." *Notice*, 1.

Plaintiffs' *Rule 60(b) Motion*

31. On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a notice of appearance on behalf of Plaintiffs.

32. On April 18, 2018, Plaintiffs filed the *Rule 60(b) Motion*. In the *Rule 60(b) Motion*. Plaintiffs argue this Court should set aside its *Order Granting the Motion to Strike, Order Granting Sanctions,* and *Sanctions Order,* based upon Mr. Moquin's excusable neglect. Plaintiff's further argue the underlying *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 787 P.2d 777 (1990) because the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for the misconduct of their attorney.

33. Plaintiffs argue their failure to provide the damages computations and adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure and this Court's orders, as well as their failure to file oppositions to the *Motion to Strike* and *Motion for Sanctions* were all due to Mr. Moquin failing "to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Rule 60(b) Motion,* 1.

34. The *Rule 60(b) Motion* purports to support its arguments primarily through the *Declaration of Larry J. Willard. Rule 60(b) Motion,* Ex. 1 (*"Willard Declaration" and "WD"* in citations to the record)[5].

35. The *Willard Declaration* includes several statements about Mr. Moquin's alleged mental disorder. It states Mr. Willard is "**convinced**" Mr. Moquin was dealing with issues and demons beyond his control. *WD* ¶ 66. It further states he "**learned**" that Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work. *WD* ¶ 67. The *Willard Declaration* states Mr. Moquin suffered a "total mental breakdown." *WD* ¶ 68. It states Mr. Moquin **explained** to Mr. Willard he had been diagnosed with bipolar disorder. *WD* ¶ 70. He declares he believes Mr. Moquin's disorder to be "severe and debilitating." *WD* ¶ 73. He states he **now sees** "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on the case." *WD* ¶ 76. And, Mr. Willard declares he **can now see** how Mr. Moquin's alleged psychological issues affected Plaintiffs' case. *WD* ¶ 87 (emphasis supplied).

36. The *Rule 60(b) Motion* also includes an internet printout purporting to list symptoms of bipolar disorder (*Rule 60(b) Motion,* Ex. 5), and several documents related to alleged spousal abuse by Mr. Moquin, some of which reference Mr. Moquin's alleged bipolar disorder, and which include an Emergency Protective Order from a California proceeding (*Rule 60(b) Motion,* Ex. 6), a Pre-Booking Information Sheet from a California proceeding (*Rule 60(b) Motion,* Ex. 7) and a Request for Domestic Violence Restraining Order, also from a California proceeding (*Rule 60(b) Motion,*

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[5] The *Willard Declaration* includes paragraphs discussing the underlying facts of the action and the initial filing of the suit in California. These paragraphs are not relevant to the Court's determination of the *Rule 60(b) Motion* and are not considered. *See e.g.*, WD ¶¶ 1-51, 100.

Ex. 8). The documents from the California proceedings are not certified by the clerk of the court.

37. Defendants filed their *Opposition to Rule 60(b) Motion Relief* on May 18, 2018 ("*Opposition*").

38. Plaintiffs filed their *Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion* on May 29, 2018 ("*Reply*"). The *Reply* attached eleven (11) new exhibits, including the new *Declaration of Larry J. Willard in Response to Defendants' Opposition to Rule 60(b) Motion for Relief. Reply*, Ex. 1 ("*Reply Willard Declaration*" and "*RWD" for citations*). [6] The *Reply's* exhibits include copies of text messages between Mr. Willard and Mr. Moquin (*Reply*, Ex. 2, 4 and 7), copies of emails between Mr. Willard and his counsel (*Reply, Ex.* 3, 6, 8 and 10), a receipt detailing an alleged payment made by Mr. Willard to Mr. Moquin's doctor on March 13, 2018 (*Reply*, Ex. 5), and a letter from Mr. Williamson to Mr. Moquin dated May 14, 2018 (*Reply*, Ex. 9).

39. On June 6, 2018, Defendants filed their *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply*, arguing this Court should strike Exhibits 1-10 to the *Reply* because: (a) Defendants did not have the opportunity to respond to those exhibits in their *Opposition to the Rule 60(b) Motion*; (b) exhibits contained inadmissible hearsay and/or inadmissible lay opinion testimony; and (c) a number of exhibits were not relevant to this Court's determination of excusable neglect.

40. Defendants' *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply* was fully-briefed and submitted to this Court for decision on June 29,

[6] The Court disregards the paragraphs included in the *Willard Declaration* and the *Reply Willard Declaration* that can be construed to be stated appeal to the Court's sympathy. *See e.g., WD* ¶ 91 -100; *RWD* ¶ 67

2018. Subsequently, Plaintiffs' counsel stipulated to the filing of a sur-reply. No sur-reply was filed by Defendants.

41. In its *Sanctions Order*, the Court made the following findings of fact and conclusions of law, among others: First, Plaintiffs failed to provide damages disclosures and failed to properly disclose an expert witness in violation of this Court's express Orders. *Sanctions Order* ¶¶ 67, 68. Plaintiffs acknowledged their failure to properly disclose an expert witness in accordance with NRCP 16.1(a)(2)(B). *Stipulation and Order*, February 9, 2017. Plaintiffs did not thereafter attempt to properly disclose the expert witness for the entirety of 2017. Plaintiffs failed to comply with multiple orders of this Court. Thereafter, Defendants filed several motions to compel and Plaintiffs' non-compliance forced extension of trial and discovery deadlines on three separate occasions. This Court sanctioned Plaintiffs by ordering payment of Defendants' expenses incurred in filing the *Motion to Compel*.

42. Plaintiffs did not oppose the *Sanctions Motion* despite this Court's express admonitions that the Court was "seriously considering" dismissal.

43. If any of the following Conclusions of Law contain or may be construed to contain Findings of Fact, they are incorporated here and shall be treated as appropriately identified and designated.

CONCLUSIONS OF LAW

Based on the Court's Findings of Fact, the Court makes its Conclusions of Law as follows.

1. If any the foregoing Findings of Fact contain or may be construed to contain Conclusions of Law, they are incorporated here and shall be treated as appropriately identified and designated.

Rule 60(b) Standard

2. Under NRCP 60(b)(1), on motion, this Court may relieve a party from an order or final judgment[7] on grounds of mistake, inadvertence, surprise, or excusable neglect. NRCP 60(b)(1).

3. A party who seeks to set aside an order pursuant to NRCP 60(b)(1) "has the burden to prove mistake, inadvertence, surprise, or excusable neglect by a preponderance of the evidence." *Polivka v. Kuller*, 128 Nev. 926, 381 P.3d 651 (2012) (citations omitted); *see also Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 446, 488 P.2d 911, 915 (1971) ("'[t]he burden of proof on [a motion to set aside under Rule 60(b)] is on the moving party who must establish his position by a preponderance of the evidence.'") (quoting *Luz v. Lopes*, 55 Cal.2d 54, 10 Cal.Rptr. 161, 166, 358 P.2d 289, 294 (1960)).

The Rule 60(b) Motion is not Supported by Competent, Admissible and Substantial Evidence.

4. Plaintiffs' ground asserted to set aside the *Order Granting Defendants' Motion to Strike, Order Granting the Motion for Sanctions, and Sanctions Order*[8] is Mr. Moquin "failed to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Rule 60(b) Motion*, 1.

5. While this Court "has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b)," *Stoecklein v. Johnson Electric,*

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[7] This Court entered its *Order re Request for Entry of Judgment* on June 4, 2018, declining to enter judgment as the Court deemed it appropriate to consider the *Rule 60(b) Motion* on the underlying *Sanctions Order.*

[8] Plaintiffs argue that the *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the *Sanctions Order* did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Rule 60(b) Motion,* 12. This is addressed by the Court hereinafter.

Inc., 109 Nev. 268, 271, 849 P.2d 305, 307 (1993), "this discretion is a legal discretion and cannot be sustained where there is no competent evidence to justify the court's action." *Id.* (emphasis added) (citing *Lukey v. Thomas*, 75 Nev. 20, 22, 333 P.2d 979 (1959)); *see also Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (holding a court abuses its discretion when its decision is not supported by substantial evidence; substantial evidence "defined as that which a reasonable mind might accept as adequate to support a conclusion" (internal quotation marks omitted)).

6. The *Rule 60(b) Motion* purports to provide substantial evidence to support its legal argument through the *Willard Declaration* and the *Reply Willard Declaration* together with the attached exhibits, all of which contain statements and documents that are inadmissible, and in some instances, inadmissible on multiple grounds.

7. The *Willard Declaration* includes several statements about Mr. Moquin's alleged mental disorder. As set forth in the Findings of Fact, *supra,* Mr. Willard declares he is "convinced" Mr. Moquin was dealing with issues and demons beyond his control (*WD* ¶ 66); he "learned" Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work (WD ¶ 67; *RWD* ¶ 15); Mr. Moquin suffered a "total mental breakdown" (*WD* ¶ 68; *RWD* ¶16); Mr. Moquin explained to Mr. Willard he had been diagnosed with bipolar disorder (*WD* ¶ 70; *RWD* ¶ 37); Mr. Willard believes Mr. Moquin's disorder to be "severe and debilitating" (*WD* ¶ 73); Mr. Willard now sees "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on

the case (*WD* ¶ 76); and, Mr. Willard can now see how Mr. Moquin's alleged psychological issues affected his case (*WD* ¶ 87).[9]

8. The *Willard Declaration* addresses Mr. Moquin's private life, including his personal mental status and the conflict in his marriage.

9. Mr. Willard statements are not all based on his own perceptions.

10. It logically follows, based on the subject matter, Mr. Willard could not have credibly obtained this information by observing it.

11. Mr. Willard lacks personal knowledge to testify to the assertions included in the *Willard Declaration* and the *Reply Willard Declaration* regarding Mr. Moquin's mental disorder, private personal life, and private marital conflicts.

12. It further logically follows, Mr. Willard could only have obtained this information by communication from Mr. Moquin (or Mr. Moquin's wife), although he does not overtly state this.

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[9] The *Willard Declaration and the Reply Willard Declaration* contain many nearly identical statements. They compare as follows:

***Willlard Declaration* Paragraph**	***Reply Willard Declaration* Paragraph**
53	7
54	8
59	9
63	11
64	12 (slightly differs)
65	13
67	15
68	16
69	35
70	38
71	39
82	10 (Similar - not exact)
89	3
91	67

13. The *Willard Declaration* and *Reply Willard Declaration* include inadmissible hearsay and under NRS 51.035 and 51.065. *See Agnello v. Walker*, 306 S.W.3d 666, 675 (Mo. App. 2010), as modified, (Apr. 27, 2018) (hearsay testimony or documentation cannot serve as the evidence necessary to meet movant's burden of persuasion to set aside judgment under Rule 60); *New Image Indus. v. Rice,* 603 So.2d 895, 897 (Ala. 1992) (affirming trial court's refusal to grant Rule 60 relief where the only evidence of excusable neglect was an affidavit containing inadmissible hearsay and speculation).

14. Separate and apart from the challenge to the *Willard Declaration* and the *Reply Willard Declaration* on hearsay grounds, Mr. Willard's statements are also speculative and therefore inadmissible. He does not declare he personally observed Mr. Moquin's alleged condition until he draws this unqualified conclusion late in the case, and, even if he had, he speculates what the mental disorder could cause and caused, offering an internet article to boost his credibility, which is also hearsay with no applicable exception offered.

15. The assertion describing Mr. Moquin's statement to Mr. Willard that Dr. Mar diagnosed Mr. Moquin with bipolar disorder (*WD* ¶ 69; *RWD* ¶35) is inadmissible hearsay with no exception under NRS 51.105(1) because the Mr. Willard's declaration does not constitute Mr. Moquin's declaration of "then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health." Instead, Dr. Mar, purportedly diagnosed Mr. Moquin; Mr. Moquin told Mr. Willard of Dr. Mar's purported diagnosis; and Mr. Willard makes the statement of Mr. Moquin's diagnosis. The statements were not spontaneous and instead were a basis for Mr. Moquin to request monetary assistance.

16. Even if it is construed that Mr. Moquin's report of Dr. Mar's diagnosis constituted Mr. Moquin's statement of then existing mental condition. Mr. Willard's statements are not admissible as contemporaneous statements Mr. Moquin made about his own present physical symptoms or feelings. *See* 2 McCormick on Evid. §273 (7th ed.) ("[s]tatements of the declarant's present bodily condition and symptoms, including pain and other feelings, offered to prove the truth of the statements, have been generally recognized as an exception to the hearsay rule. Special reliability is provided by the spontaneous quality of the declarations, assured by the requirement that the declaration purport to describe a condition presently existing at the time of the statement."). No spontaneous statement of Mr. Moquin, as the declarant, were offered.

17. The *Willard Declaration* and the *Reply Willard Declaration* also contains hearsay within hearsay, which is inadmissible under NRS 51.067.

18. Mr. Willard also purports to declare Mr. Moquin had a complete mental breakdown, how Mr. Moquin's symptoms of his alleged bipolar disorder might manifest, and how those symptoms may have affected Mr. Moquin's work. *WD* ¶¶ 68, 73-76 and 87-88; *RWD* ¶ 16, 38.

19. These statements are inadmissible as impermissible lay opinion under NRS 50.265. Mr. Willard is not a licensed health care provider qualified to opine on Mr. Moquin's mental condition, mental disorder, or symptoms of any disorder or condition that manifested.

20. Mr. Willard surmises, speculates and draws conclusions. He is not qualified to testify about what medical, physical, or mental condition Mr. Moquin may have, or the effect of that condition on his work. *White v. Com*, 616 S.E.2d 49, 54, 46 Va. App. 123, 134 (2005) ("While lay witnesses may testify to the attitude and demeanor

of the defendant, lay witnesses cannot express an opinion as to the existence of a particular mental disease or condition.") (Citations omitted).

21. Plaintiffs contend Mr. Willard's opinions of how Mr. Moquin's alleged condition might manifest with symptoms and how those symptoms may have affected Mr. Moquin's work are appropriate because "lay witnesses can offer testimony as to a person's sanity." *Reply*, 2. Plaintiffs cite *Criswell v. State*, 84 Nev. 459, 464, 443 P.2d 552, 555 (1968) for the proposition that lay witnesses can offer testimony as to a person's sanity. However, *Criswell* was overruled in 2001. *See Finger v. State*, 117 Nev. 548, 576-77, 27 P.3d 66, 85 (2001) (en banc decision regarding the legal insanity defense and statutorily created "guilty, but mentally ill plea" and holding the legislative abolishment of insanity as a complete defense to a criminal offense unconstitutional, among other holdings, including that lay witnesses cannot testify as to "insanity" because the term has a precise and narrow definition under Nevada law).

22. The Court concludes the *Finger* holdings are not applicable here. First, the *Finger* case involves a defense to criminal charges. Second, Mr. Willard did not testify that Mr. Moquin was sane or insane; he testified about the diagnosis of bipolar disorder, possible symptoms of bipolar disorder and how those symptoms, if present, might have affected Mr. Moquin's work.

23. The Nevada Revised Statutes (Evidence Code) provides:

> A lay witness may testify to opinions or inferences that are "[r]ationally based on the perception of the witness; and ... [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265. A qualified expert may testify to matters within their "special knowledge, skill, experience, training or education" when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.

NRS 50.275; *Burnside v. State*, 131 Nev. Adv. Op. 40, ___, 352 P.3d 627, 636 (death penalty case detective allowed to testify about cell phone records as lay witness). Further,

> [t]he key to determining whether testimony constitutes lay or expert testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience? *See Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 846 (10th Cir.1979) (observing that lay witness may not express opinion "as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness"); Fed.R.Evid. 701 advisory committee's note (2000 amend.) ("[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." (internal quotation marks omitted)); *State v. Tierney*, 150 N.H. 339, 839 A.2d 38, 46 (2003) ("Lay testimony must be confined to personal observations that any layperson would be capable of making.").

Id.

24. While the Nevada Supreme Court and Court of Appeals have not addressed lay witness testimony, such as that contained in the *Willard Declaration* and *Reply Willard Declaration*, regarding bipolar disorder, this has been specifically addressed by the Pennsylvania court and is persuasive here. In the case of *In re Petition for Involuntary Commitment of Joseph R. Barbour*, the Superior Court of Pennsylvania held, "Lay witness and non-expert could not provide expert testimony regarding involuntary committee's medical diagnosis, specifically the existence of mood disorder known as bipolar disorder." *In re Petition for Involuntary Commitment of Joseph R. Barbour*, 733 A.2d 1286 (PA. 1999). This Court therefore concludes such testimony is inadmissible to support the *Rule 60(b) Motion*.

25. The documents attached as Exhibits 6, 7 and 8 to the *Rule 60(b) Motion*, which purport to detail Mr. Moquin's alleged domestic abuse of his family, and which also contain statements about Mr. Moquin's alleged bipolar condition, are inadmissible as discussed, *supra*, with regard to bipolar disorder.

26. Exhibits 6, 7 and 8 to the *Rule 60(b) Motion* are not, and cannot be, authenticated by Mr. Willard. Mr. Willard is not the author of the documents and has no personal knowledge of their authenticity. He therefore cannot authenticate or identify the documents pursuant to NRS 52.015(1) or NRS 52.025.

27. Exhibits 6, 7 and 8 do not meet the requirements for presumed authenticity under NRS 52.125, as the exhibits are not certified copies of public records.

28. Pursuant to NRS 47.150, a judge or court may take judicial notice, whether requested to or not. Further, a judge or court shall take judicial notice if requested by a party and supplied with the necessary information. NRS 47.150. Here, no party requested this Court to take judicial notice of the California court records contained in the exhibits Exhibit 6 to the *Rule 60(b) Motion* and the *Reply* based on certified copies. The Court exercises its discretion and declines to take judicial notice here.

29. Moreover, even if Exhibits 6, 7 and 8 could be authenticated, the statements contained in those exhibits regarding Mr. Moquin's alleged mental disorder and condition, are inadmissible lay opinion about bipolar disorder and would still be inadmissible hearsay, as they were apparently authored by Mr. Moquin's wife, and Plaintiffs are offering them to prove that Mr. Moquin suffers from bipolar disorder and his life was in "shambles."

30. A number of *Reply* Exhibits and discussed in *Reply Willard Declaration* also contain inadmissible hearsay.

31. All of the texts and emails offered by Plaintiffs and authored by Mr. Moquin or Mr. O'Mara constitute inadmissible hearsay under NRS 51.035 and 51.065.

32. Specifically, Exhibit 2 and 3 to the *Reply*, the text messages authored by Mr. Moquin in Exhibit 4, the text messages authored by Mr. Moquin in Exhibit 7, the email authored by Mr. Moquin in Exhibit 8, and the emails authored by Mr. Moquin in Exhibit 10 are therefore disregarded as inadmissible hearsay.

33. Exhibits attached to the *Reply* also contain communications occurring after this Court issued its *Order Granting Motion to Strike* and its *Order Granting Sanctions.*

34. All of statements in the *Reply Willard Declaration* set forth after Paragraph 37 detail events and communications from late January, 2018 through late May, 2018, all of which occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order. Willard Declaration* ¶¶ 37-67.

35. Exhibits 5, 6, 7, 8, 9, and 10 to the *Reply* contain only communications and descriptions of events that occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order.*

36. Logically, relevant events asserted to support Plaintiffs' argument of excusable neglect must have necessarily occurred prior to the entry of the orders Plaintiffs seek to set aside.

37. Statements in the *Reply Willard Declaration* after Paragraph 37 and Exhibits 5, 6, 7, 8, 9, and10 to the *Reply* are not relevant to this Court's determination of

whether Plaintiffs have met their burden of proving excusable neglect under NRCP 60(b).

38. Competent and substantial evidence has not been presented to establish *Rule 60(b) Relief.*

Notwithstanding Plaintiff's Lack of Admissible Evidence, Plaintiffs Fail to Meet their Burden under Rule 60(b) to Set Aside the *Sanctions Order* and *Order Granting Motion to Strike.*

39. Under Nevada law, "'clients must be held accountable for the acts and omissions of their attorneys.'" *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 204, 322 P.3d 429, 433 (2014) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-97, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). The client "'voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts of omissions of this freely selected agent.'" *Huckabay Props.*, 130 Nev. at 204, 322 P.3d at 433 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (rejecting the argument that petitioner's claim should not have been dismissed based on counsel's unexcused conduct because petitioner voluntarily chose his attorney).

40. In *Huckabay Props.*, the Nevada Supreme Court dismissed an appeal where appellant's counsel failed to file an opening brief following two granted extensions and a court order granting appellants a final extension. *Huckabay Props.*, 130 Nev. 209, 322 P.3d at 437. In *Huckabay Props.*, the appellant was represented by

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two attorneys. In dismissing the appeal, and applicable to civil litigation at the trial court level here, the Court held:

> Nevada's jurisprudence expresses a policy preference for merits-based resolution of appeals, and our appellate procedure rules embody this policy, among others, litigants should not read the rules or any of this court's decisions as endorsing noncompliance with court rules and directives, as to do so risks forfeiting appellate relief. In these appeals, appellants failed to timely file the opening brief and appendix after having been warned that failure to do so could result in the appeals' dismissals. Appellants actually had two attorneys who received copies of this court's notices and orders regarding the briefing deadline, but they nevertheless failed to comply with briefing deadlines and court rules and orders . . . and an appeal may be dismissed for failure to comply with court rules and orders and still be consistent with the court's preference for deciding cases on their merits, as that policy must be balanced against other policies, including the public's interest in an expeditious appellate process, the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administration considerations, such as case and docket management. As for declining to dismiss the appeal because the dilatory conduct was occasioned by counsel, and not the client, that reasoning does not comport with general agency principles, under which a client is bound by its civil attorney's actions or inactions.

Huckabay Props. v. NC Auto Parts, 130 Nev. at 209, 322 P.3d at 437.

41. In *Huckabay Props.*, however, the court recognized exceptional circumstances providing two possible exceptions "to the general agency rule that the 'sins' of the lawyer are visited upon his client where the lawyer's addictive disorder and abandonment of his legal practice or criminal conduct justified relief for the victimized client." *Id.* at 204 n.4, 322 P.3d at 434 n.4 (citing *Passarelli*, 102 Nev. at 286). Notably, these exceptions noted by the court in *Huckabay Props.* are not present here, as the facts of *Pasarelli* are readily distinguishable.

42. First, in *Passarelli*, the record included evidence the attorney suffered from a substance abuse disorder that resulted in missed office days and appointments and an inability to function. *Passarelli*, 102 Nev. at 285. Second, the attorney voluntarily

closed his law practice. *Id.* Third, the attorney was placed on disability inactive status by the Nevada Bar. *Id.* Finally, the client in *Passarelli* had only one attorney. *Id.*

43. None of these facts are present in this case. As concluded, *supra*, no competent, reliable and admissible evidence of Mr. Moquin's claimed mental disorder is before this Court. Further, there is no evidence of missed meetings or absences from office due to the claimed conditions. There is no evidence that Mr. Moquin closed his law practice.

44. Mr. Moquin is on active status with the California Bar. *Opposition to Rule 60(b) Motion*, Ex. 5; *Attorney Search, The State Bar of California, http://members.calbar.ca.gov/fal/LicenseeSearch* (last visited Nov. 30, 2018).

45. Pursuant to NRS 47.150, the Court may take judicial notice, whether requested or not. A fact subject to judicial notice must be either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. NRS 47.130. It follows that the State Bar of California provides accurate information regarding licensing of attorneys which cannot be reasonably questioned. The Court takes judicial notice of Mr. Moquin's active status.

46. Applied here, the *Huckabay Props./Passarelli* analysis compels denial of the *Rule 60(b) Motion*. The standard for "excusable neglect" based on activities of a party's attorney requires the attorney be completely unable to respond or appear in the proceedings. *See Passarelli*, 102 Nev. at 285 (court found excusable neglect where attorney failed to attend trial due to psychiatric disorder which caused him to shut down his practice and was placed on disability inactive status by the State Bar of Nevada); *see also Cicerchia v. Cicerchia*, 77 Nev. 158, 160-61, 360 P.2d 839, 841 (1961) (court

found excusable neglect where respondent lived out of state and suffered a nervous breakdown shortly after retaining out of state counsel, who was unaware and uninformed of the time to appear).

47. Here, Plaintiffs' attorneys did not completely abandon the case. Rather, the Nevada Rules of Civil Procedure, this Court's express orders, and Defendants' requests for damages computations and expert disclosures were ignored. Further, this Court granted, upon was also ignored.

48. Plaintiffs attempt to excuse this conduct in their *Rule 60(b) Motion* by claiming Mr. Moquin had suffered a complete mental breakdown and his personal life was "in shambles." In addition, to the preclusion of evidence discussed, *supra*, the evidence is vague at best regarding these assertions and vague regarding if, and when, Mr. Moquin's alleged disorder impaired him and are vague in asserting when any of the alleged events took place. Plaintiffs do attach additional exhibits to their *Reply* that offer some information on timing but are inadequate for the Court's determination.

49. Specifically, Exhibit 2 to the *Reply* appears to be a text string between Mr. Willard and Mr. Moquin from December 2, 2017 through December 6, 2017, in which Mr. Willard inquires about the status of Plaintiffs' filing in response to the *Motion for Sanctions*. *Reply*, Ex. 2. The text messages reflect Mr. Willard was aware of the initial deadline, December 4, 2017, for Plaintiffs to respond to the *Motion for Sanctions* (based on the November 15, 2017 filing date and electronic service).

50. Defendants agreed to extensions through 3:00 pm on December 6, 2017 for Plaintiffs to file their oppositions.

51. The Court granted an additional extension through December 18, 2018.

52. Plaintiffs had knowledge of the initial filing deadline. They were aware no opposition papers were filed. Mr. Willard continued to communicate with both Mr. Moquin and Mr. O'Mara from December 11 until December 25, 2017 regarding the delinquent filings (*Reply*, Ex. 3, 4), well after this Court's final filing deadline of December 18, 2017. *Sanctions Order* ¶ 95.

53. Despite knowing no oppositions had been filed, neither Mr. Willard (through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or this Court to address the status of this case. *Sanctions Order* ¶ 98.

54. Plaintiffs did nothing to apprise this Court of any issues until they filed the *Rule 60(b) Motion*.

55. Plaintiffs started looking for attorneys who might be able to help. *Reply Willard Declaration* ¶ 36. Plaintiffs instead provided personal financial assistance to Mr. Moquin and did not terminate his services. *WD* ¶ 71; *RWD* ¶ 39.

56. Plaintiffs knew timely oppositions were not filed.

57. Plaintiffs chose to retain Mr. Moquin and did not terminate his representation, even after becoming aware that he did not file a timely response to the *Motion for Sanctions*. Plaintiffs cannot now avoid the consequences of the acts of omissions of their freely selected agent.

58. Plaintiffs voluntarily chose to stop seeking new counsel to assist and chose to continue to rely on Mr. Moquin solely for financial reasons. *Willard Declaration* ¶ 81.

59. Plaintiffs' multiple instances of non-compliance, including the Plaintiffs failure to provide a compliant damages disclosure in this action, is reflected in the court file for this proceeding, occurring well before Mr. Moquin's purported breakdown in

December, 2017 or January, 2018 asserted as preventing him from opposing the motions.

60. Mr. O'Mara was counsel of record and did not report any issues related to Mr. Moquin to this Court until the filing of his *Notice* in March. *Notice, 1.*

61. The Court gave counsel notice of the seriousness of Plaintiffs' violations and expressed it was considering dismissal based on those violations. *Opposition to Rule 60(b) Motion.* Ex. 3, December 12, 2017 Transcript ("you need to know going into these oppositions, that I'm very seriously considering granting all of it . . . I haven't decided it, but I need to see compelling opposition not to grant it."). Plaintiffs and their attorneys were given notice of the potential consequence of failing to file an opposition to the *Sanctions Motion.*

62. Mr. Moquin did not abandon Plaintiffs. He appeared at status hearings, participated in depositions, filed motions and other papers, including a lengthy opposition to Defendants' motion for partial summary judgment. Mr. Moquin participated in oral arguments and filed two summary judgment motions with substantial supporting exhibits and detailed declarations.

63. A party "cannot be relieved from a judgment [order] taken against him in consequence of the neglect, carelessness, forgetfulness, or inattention of his attorney," *Cicerchia*, 77 Nev. at 161.

Plaintiffs Knew of Mr. Moquin's Alleged Condition and Alleged Non-responsiveness prior to the *Sanctions Order* and did Nothing and, therefore, Cannot Establish Excusable Neglect.

64. In the *Willard Declaration* and *Reply Willard Declaration,* Mr. Willard admits he knew Mr. Moquin was having personal financial difficulties and that he borrowed money from friends and family to fund Mr. Moquin's personal expenses. *WD*

¶¶ 63-65; *RWD* ¶ 11-13. Mr. Willard also admits that he recommended a psychiatrist to Mr. Moquin and he again borrowed money from a friend to pay for Mr. Moquin's treatment. *WD* ¶¶ 68-71; *RWD* ¶ 11-13. Mr. Willard was aware of Mr. Moquin's alleged problems prior to this Court's *Order Granting Motion to Strike and Sanctions Order*, yet continued to allow Mr. Moquin to represent Plaintiffs.

65. Mr. Willard was aware of Mr. Moquin's inaction which distinguishes this case from the cases upon which Plaintiffs rely in the *Rule 60(b) Motion*, where the parties were unaware of their attorneys' problems. See e.g., *Passarelli*, 102 Nev. at 286 ("Passarelli was effectually and unknowingly deprived of legal representation") (emphasis added); *U.S. v. Cirami*, 563 F.2d 26, 29-31 (2d Cir. 1977) (client discovered that attorney had a mental disorder that prevented him from opposing summary judgment more than two years later); *Boehner v. Heise*, 2009 WL 1360975 at *2 (S.D.N.Y. 2009) (client did not learn case had been dismissed or and did not learn of attorney's mental condition until several months after dismissal). Here, Mr. Willard knew of the actions that supported the *Sanctions Order*.

66. Mr. Willard admits he was informed by Mr. O'Mara prior to the dismissal of the Plaintiffs' claims that Mr. Moquin was not responsive. Plaintiffs failed to replace Mr. Moquin or take other action due to perceived financial reasons. *Willard Declaration* ¶81. Plaintiffs' knowledge and inaction vitiates excuse for neglect.

67. The *Rule 60(b) Motion* cites authority for the proposition that even "where an attorney's mishandling of a movant's case stems from the attorney's mental illness," which might justify relief under Rule 60(b). However, "client diligence must still be shown." *Cobos v. Adelphi Univ.*, 179 F.R.D. 381, 388 (E.D.N.Y. 1998); see also *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 357 (5th Cir. 1993) ("A party has a

duty of diligence to inquire about the status of a case...."); *Pryor v. U.S. Postal Service*, 769 F.2d 281, 287 (5th Cir. 1985) ("This Court has pointedly announced that a party has a duty of diligence to inquire about the status of a case....").

68. Mr. Willard's claim that he had no choice but to continue working with Mr. Moquin due to financial issues lacks credibility as he admits he was able to borrow money to fund Mr. Moquin's personal life and medical treatment. It logically follows he had resources to retain new attorneys at the time.

69. Plaintiffs have not established by substantial evidence that they exercise diligence to rectify representation in their case despite ample knowledge of Mr. Moquin's non-responsiveness.

The *Rule 60(b) Motion* should be Denied because Two Attorneys Represented Plaintiffs had an Obligation to Ensure Compliance with the Nevada Rules of Civil Procedure and this Court's Orders.

70. Plaintiffs' *Rule 60(b) Motion* ignores the fact David O'Mara served as local counsel. In Nevada, the responsibilities of local counsel are clearly defined, and encompass active responsibility to represent the client and manage the case:

> (a) The Nevada attorney of record shall be responsible for and actively participate in the representation of a client in any proceeding that is subject to this rule.
> (b) The Nevada attorney of record shall be present at all motions, pre-trials, or any matters in open court unless otherwise ordered by the court.
> (c) The Nevada attorney of record shall be responsible to the court...for the administration of any proceeding that is subject to this rule and for compliance with all state and local rules of practice. It is the responsibility of Nevada counsel to ensure that the proceeding is tried and managed in accordance with all applicable Nevada procedural and ethical rules.

SCR 42(14). Mr. O'Mara's representation, even if contractually limited, was governed by this rule.

71. Mr. O'Mara expressly "consent[ed] as Nevada Counsel of Record to the designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his *Motion to Associate Counsel. Motion to Associate Counsel.*

72. Mr. O'Mara attended every hearing and court conference in this case. And, among other things, Mr. O'Mara signed the Verified Complaint and the First Amended Verified Complaint. *Complaint*; *FAC*.

73. WDCR 23(1) provides:

> Counsel who has appeared for any party shall represent that party in the case and shall be recognized by the court and by all parties as having control of the client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing office, in accordance with SCR 46 and this rule.

WDCR 23.

74. Mr. O'Mara was the sole signatory on Plaintiffs' deficient initial disclosures, (*Opposition to Rule 60(b) Motion,* Ex. 6), the uncured deficiencies of which were a basis for sanction of dismissal. *Sanctions Order.*

75. Mr. O'Mara also signed and filed the *Brief Extension Request* with this Court representing,

> Counsel has been diligently working for weeks to respond to Defendant's serial motions, which include seeking dismissal of Plaintiffs' case. With the full intention of submitting said responses, Counsel for Plaintiffs encountered unforeseen computer issues.... Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and submit the oppositions to Defendants' three motions.

Brief Extension Request.

76. Mr. O'Mara's involvement precludes a conclusion of excusable neglect here.

The *Sanctions Order* was Sufficient under Nevada Law

77. Plaintiffs assert that the *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the *Sanctions Order* did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Rule 60(b) Motion* at 12. However, consideration of this factor is discretionary, not mandatory. See *Young v. Johnny Ribeiro*, 106 Nev. at 93 ("The factors a court **may** properly consider include . . . whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney") (emphasis supplied).

78. The Court concludes factors enumerated in *Young v. Johnny Ribeiro Bldg., Inc.* were met by the *Sanctions Order*. Specifically, the Nevada Supreme Court held where a court issues an order of dismissal with prejudice as a discovery sanction a court may consider, among others, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, and the feasibility and fairness of alternative, less severe sanctions. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. at 93. The factors are not mandatory so long as the Court supports the order with "an express, careful and preferably written explanation of the court's analysis of the pertinent factors." *Id.*

79. While each suggested factor discussion in the *Sanctions Order* was not labeled by factor, the Court addressed the factors it deemed appropriate.

80. In light of the circumstances in this case, the dismissal of Plaintiffs' claims did not unfairly penalize Plaintiffs based on the factors analyzed in the *Sanctions Order*.

80.

81. Plaintiffs assert this Court must address the additional factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). *Yochum* involves relief from a default judgment and not an order, as here, where judgment has not been entered. *Yochum* does not preclude denial of the motion.

The *Rule 60(b) Motion* should be Denied.

82. After weighing the credibility and admissibility of the evidence provided in support of the *Rule 60(b) Motion,* substantial evidence has not been presented to establish excusable neglect.

83. Plaintiffs have failed to meet their burden of proving, by a preponderance of the evidence, excusable neglect so as to justify relief under NRCP 60(b).

ORDER

Based upon the foregoing, Plaintiffs' *Rule 60(b) Motion* is **DENIED**, in its entirety.

DATED this 5th day of November, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 30 day of November, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

RICHARD WILLIAMSON, ESQ.

JONATHAN TEW, ESQ.

BRIAN IRVINE, ESQ.

ANJALI WEBSTER, ESQ.

JOHN DESMOND, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

EXHIBIT “3”

EXHIBIT “3”

EXHIBIT “3”

FILED
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CV14-01712
2018-12-11 03:23:03 PM
Jacqueline Bryant
Clerk of the Court
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DICKINSON WRIGHT, PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (844) 670-6009
Email: Jdesmond@dickinsonwright.com
Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

Attorney for Defendants
Berry Hinckley Industries and
Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual

Defendants.
_____/

CASE NO. CV14-01712

DEPT. 6

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.

/

~~[PROPOSED]~~ JUDGMENT

This action, having come before this Court, the Honorable Lynne K. Simons presiding, and all of the claims of Plaintiffs Larry J. Willard, individually and as trustee of the Larry James Willard Trust (the "Willard Plaintiffs"), having been dismissed by this Court with prejudice in its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions filed herein on March 6, 2018, this Court having denied the Willard Plaintiffs' NRCP 60(b) Motion for Relief on November 30, 2018, and all of the counterclaims of Defendants Berry-Hinckley Industries ("BHI") and Jerry Herbst having been dismissed by this Court in its Order granting Defendants' Motion for voluntary dismissal filed herein on April 13, 2018,

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendants and against the Willard Plaintiffs on all of the Willard Plaintiffs' claims and that such claims are dismissed with prejudice.

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IT IS FURTHER ORDERED AND ADJUDGED that Defendants' counterclaims are dismissed without prejudice.

DATED this 11th day of December, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 11525
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (844) 670-6009
Email: Jdesmond@dickinsonwright.com
Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

Attorneys for Defendants
Berry Hinckley Industries, and
Jerry Herbst

4185

IN THE SECOND JUDICIAL DISTRICT COURT

STATE OF NEVADA, COUNTY OF WASHOE

THE HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

LARRY J. WILLARD, et al., Department No. 6

Plaintiffs, Case CV14-01712

vs.

BERRY-HINCKLEY INDUSTRIES, et al.,

Defendants.

_____/

Pages 1 to 18, inclusive.

TRANSCRIPT OF PROCEEDINGS

STATUS HEARING

August 17, 2015

REPORTED BY: Christina Amundson, CCR #641
Sunshine Reporting, 323.3211

A P P E A R A N C E S:

FOR PLAINTIFFS: David O'Mara, Esq.
O'Mara Law Firm
311 E. Liberty Street
Reno, NV 89501

FOR PLAINTIFFS: Brian Moquin, Esq.
3507 La Castellet Court
(Via phone) San Jose, CA 95148

FOR DEFENDANTS: Brian Irvine, Esq.
Dickinson Wright
100 W. Liberty, Ste. 940
Reno, NV 89501

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RENO, NEVADA -- 8/17/15 -- 11:09 A.M.

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THE COURT: Good morning. Please be seated. This is the time set for a status hearing for 11:00 a.m. on August 17th, 2015, in Case No. CV14-01712, Larry J. Willard, et al v. Berry-Hinckley Industries and Jerry Herbst, et al. And in addition to the underlying claims, there are also counterclaims asserted in this matter.

Would you go ahead and state your appearances for me, please.

MR. IRVINE: Yes. Good morning, your Honor. Brian Irvine from Dickinson, Wright on behalf of Defendants and Counter Plaintiffs.

MR. O'MARA: Good morning, your Honor. David O'Mara with the O'Mara Law Firm on behalf of Plaintiffs, acting as local counsel for Brian Moquin on the telephone.

THE COURT: Right.

Mr. Moquin, would you like to state your appearance.

MR. MOQUIN: Yes. Good morning, your Honor. Brian Moquin appearing for Plaintiffs.

THE COURT: All right. So, I want to

clarify a couple things for the record first. And I wanted to tell you that I have requested that Commissioner Wes Ayres be present in court today and be totally apprised of this matter going forward as well as today.

Now, I set this status hearing because we were -- several motions have been coming before the Court. I had a concern regarding the lack of oppositions but -- and I'm going to ask you, Mr. Irvine, to feel free to correct me on anything that I am misstating.

But we're here on Defendant's Second Motion to Compel Discovery Responses as well as the motion -- there's an error in the title, but Motion for Contempt Pursuant to NRCP 45(e) and Motion for Sanctions Against Plaintiff's Counsel pursuant to NRCP 37, correct?

MR. IRVINE: Yes, your Honor. And I would say that the second motion to compel that we have on file actually relates back to the first motion.

THE COURT: Right.

MR. IRVINE: Same set of written discovery, but otherwise you stated that perfectly.

THE COURT: Okay.

MR. O'MARA: The one for contempt is also in regards to a subpoena to a third party, not to the parties in this case.

THE COURT: Correct.

MR. IRVINE: And, your Honor, just to clarify, on the motion for contempt and for sanctions, we addressed this in a footnote in our request for this status conference. But we did not submit that motion for decision after you signed the order shortening time because we did get a response from that third party --

THE COURT: Okay.

MR. IRVINE: -- so that motion is moot.

THE COURT: The motion for the settlement has not been submitted.

MR. IRVINE: Yes, and it's now moot.

THE COURT: Okay. That's what I wanted to clarify for the record because it was pending and I was greatly concerned that such a motion had not been opposed.

And let me tell you what we're going to do today. My tentative decision on the motion to compel, second motion, is to grant it. There is no opposition in the file. I've read everything

thoroughly. I'm not closing the door, if you want to present any argument but, obviously, you're somewhat behind the eight ball because there's no response to the Court, although there was a deadline.

That being said, in addition, I believe -- now, with regard to -- I moved my outline. Hold on. With regard to the motion to compel, here's where I have some concerns from my point of view, that this action is more than a year old. And here we are, a jury trial is approaching quickly in January and you're getting into some very key discovery that you're going to want to conduct including your experts' depositions.

And there's just not a lot of room to monkey around with production. I mean, it needs to be done and it needs to be -- the plaintiff certainly decided to file the action and so certainly should be in a position to provide all documents and full answers.

Now, going forward there's a couple things that we are going to do. I understand that you've requested fees and costs and they may be warranted. But on the other hand, it seems to me that when

we're under this type of time crunch that I also want to ensure that there's available judicial oversight to try to preclude -- to enhance getting the information produced without the necessity of these types of motions, which I am sure everybody's preference is.

And, therefore, from here on out Commissioner Ayres is going to handle the discovery. He will be setting incremental status hearings so that you're checking in as these critical dates come up. He will -- any motions filed regarding discovery will be via recommendation and then to me.

But one of the things that I want to make sure I'm wholeheartedly understanding from my own practice is that as you get into the nuances of responses to interrogatories and whether or not they were complete answers or whether or not there's full production, I think it's very helpful to have the discovery commissioner there on a moment's notice to say -- and to really go through and sift out yes, this is complete, no, that isn't.

So, that's my intent going forward. He and I have discussed that he will have -- it's a proactive management that we're going to undertake

now and that is that he will have hearings that on an incremental basis as he decides. You know, I thought, perhaps, every two weeks, maybe every month. But that does not preclude anyone from making their objections timely, as I anticipate there's going to be more discovery or filing appropriate motions. But I'm hoping that having him available on an incremental basis here on out will allow you to resolve some things before you have to get to the motion stage.

Everyone understand that?

MR. O'MARA: Yes, your Honor.

MR. IRVINE: Yes, your Honor.

THE COURT: Now, I'm assuming that Mr. Moquin is responsible for the discovery responses primarily, not your offices, correct?

MR. O'MARA: That's correct, your Honor. Mr. Moquin -- we're here in the local counsel aspect of this so he's been doing all the discovery.

THE COURT: All right. So, Mr. Moquin, did you hear all of that, what I just stated.

MR. MOQUIN: Yes, I did.

THE COURT: I was talking away to Mr. O'Mara, not meaning to not look at the phone. I was

making eye contact with Mr. O'Mara.

MR. MOQUIN: No. I heard perfectly.

THE COURT: Okay. So, I'm correct that you have not filed an opposition to the defendant's Second Motion to Compel Discovery Responses, correct?

MR. MOQUIN: That is correct, for two reasons. One, I take full responsibility for the fact that they were overdue. I never charge my clients or pass on this kind of thing when it's my -- you know, it's actually my fault.

There are things in that motion which I disagree with but, you know, on the whole, unfortunately, this has been two and a half, almost three months of back-to-back trials plus unexpectedly having to move and it's just been an overwhelmingly, you know -- I've been sleeping every other day, quite literally.

And, you know, so I have -- I'm a solo practitioner. I have no assistants. I'm looking to hire assistants. I've been interviewing, in fact, other counsel to come onboard to assist here. But, you know, occasionally tsunamis like this hit me and, unfortunately, it's happened in this case with

respect to discovery.

However, I just got out of a trial just an hour ago, which I was tied up with for the past week. And from here on out my schedule is fairly open until November. So, I don't anticipate there being these kinds of issues moving forward but I do appreciate the oversight and I defer to the wisdom of the Court.

THE COURT: All right. Thank you. And I understand that law firms have considerable workloads but, nonetheless, you belabored it more because you chose to file the lawsuit, so, in filing that lawsuit there is, obviously, an obligation on your part to diligently pursue it.

And it's unfortunate that we are at a time when there's a motion to compel. I am granting it. It provides -- and a proposed order was provided to me. That order states, "The Court" -- since you're on the phone I'll read it to you. "The Court having reviewed Defendant's Second Motion to Compel Discovery Response for the defendant's second set of requests for discovery filed on August 13th, good cause appearing it is hereby ordered Plaintiff shall have to and including" -- now, this said "Tuesday

August 18th," and I am going to change that to "Wednesday, August 19th," since we are having this hearing today. I'm going to give you two days to produce the supplemental responses.

I do want to make clear to you that the Court will entertain awards of fees and costs in this case because, unfortunately, due to the history it appears to me that many good-faith attempts were made to get responses and including -- I'm not sure that I've ever read in a motion that "we regret to file this motion," and so I don't think it was the defendant's first choice to go down this road, but, nonetheless, it does appear that it was a course of last resort.

So, I'm telling you in the -- I believe they requested fees and costs with regard to the Second Motion to Compel Discovery Responses. They did not provide an affidavit that included fees and costs and I will leave it up to the defendants as to whether or not they want to make a motion on fees and costs. I think, certainly, my interpretation was simply you want the discovery and that that was at the forefront, and if you supplement, the Court will consider that and, actually, Mr. Ayres will

consider it first. So I have signed this order.

I do want to indicate to all parties going forward it's a preference of this Court that when you do provide -- and I welcome proposed orders from both sides at any and all times. But that you have a cover sheet that says "Proposed order" but then you have the actual sheet that says "Order" behind it.

So, I think we've completed -- I know this is somewhat short and my reading and preparation and your preparation was longer, so I don't want to foreclose any other matters you'd like to discuss with the Court today.

MR. IRVINE: Well, your Honor, on the order that you just referred to, we have several important depositions coming up kind of back to back to back. We have one Thursday of Mr. Wooley, Friday of Mr. Willard and then we go down to San Jose for another deposition Tuesday of next week.

So, would it be possible for us, in order for us to more adequately prepare for the depositions, to have that be at least Wednesday by noon or so so that we could have the --

THE COURT: That's what it is.

MR. IRVINE: Okay. Wonderful. And then I understand your Honor's ruling that things will flow through Mr. Ayres now. I'm comfortable with that. I appreciate that.

But while we're here, I have another motion to compel unfiled sitting in front of me and I don't want to file it. I just want, again, to get the discovery. We have a second set of written discovery that's out. The responses -- and that was a full request for admissions, interrogatories, requests for production to each of the plaintiffs, so there's six documents.

THE COURT: When did you serve it?

MR. IRVINE: I'm not sure when the service date was. I know that it was due on August 6th, the responses were, and no responses were filed on -- served on us August 6th.

We talked to Mr. Moquin several times about that and he promised responses. We did get one response to a request for admission on Friday and one response to an interrogatory on Friday, but the other four documents are outstanding.

I really don't want to file another motion or trouble you with another motion. I just want the

discovery. We really -- this is carefully crafted stuff. You know, they're asking for damages related to tax liabilities. We don't have the tax returns that we can ask the witnesses about. This is pretty basic stuff that we really feel should have been produced pursuant to 16.1, but we're trying to get it now so we don't have to take depositions twice or hold them open, all that stuff that we like to avoid.

So, I'm not trying to short-circuit any argument on a motion to compel. But it's not like we're fighting about whether this will be produced, but it just hasn't come our way. We haven't got it yet.

THE COURT: I can't rule on something that's not been submitted --

MR. IRVINE: I understand.

THE COURT: -- without the other side having adequate notice. However, I will issue a general admonishment that the delays have to stop and that sanctions will be considered going forward. And Commissioner Ayres is aware that this is -- the delays in this case have been extraordinary and they are reaching potentially prejudicial.

And I would hope that the -- I'm admonishing the plaintiff that there are no more excuses for delays, that full and complete discovery needs to be responded to and provided. And it has been with my predecessor and also it is my position that, if you do not produce it, you can't use it.

So, the risk is that, if you have a claim on which you may be basing information, for example, tax returns, you don't produce it, you're not going to be able to use it at trial to support your claims.

So, I am providing the plaintiff with an admonishment that any recommendations regarding -- that Commissioner Ayres may make regarding sanctions, the Court will consider. Just produce the documents and produce adequate responses or there will be consequences.

I just don't feel comfortable entering anything on something that hasn't been filed with the court. And I do want to indicate that to you as well, Mr. Moquin, and I do want to -- that reminded me of something I wanted to address.

Mr. Moquin did contact my assistant and we were following up on whether there was any

oppositions filed. And he wanted to file -- basically, send me an email addressing the points in the motion and my assistant indicated that was just not proper and that I would not consider it. But I thought it was a channel for ex parte and it was unfair, so I want to tell everyone on the record that.

MR. IRVINE: Thank you, your Honor.

MR. O'MARA: Your Honor, just as a suggestion, we're here and we have Mr. Moquin on the phone and we have Commissioner Ayres that will be able to help us. I understand you're busy and you're going to pass this off to Commissioner Ayres, who we all know is highly capable of helping us in all avenues of this discovery -- and maybe we should have even tried to contact him a little bit before today, so we're happy that's going to happen.

But why don't we just keep this hearing going with Mr. Ayres and we can kind of hash out this issue that Mr. Irvine has brought in as to when these -- I know they're frustrated and I know that there's been some problems upon Mr. Moquin with having to move and things of that nature and, hopefully, we can get back on track.

If we can maybe have ten minutes of Commissioner Ayres' time, we may be able to alleviate our concerns on a formal or informal basis with everybody here.

THE COURT: So, I think that's a very great proposal. Thank you.

So, what I will do is I'm going to close the hearing that's before the court. And I do know that -- because I contacted Mr. Ayres last week -- that he has reviewed a lot of materials so he's prepared. I don't want to put him on the spot, but I'm sure we can print off anything else that he needs. This portion has been reported, so if you don't need the other portion, we can terminate the court reporting.

From my perspective I will be in recess and you can commence. I'll go ahead and leave these documents up here, Commissioner, in case you want them. You're welcome to sit at the table or at the bench, whatever you prefer. And the order is here and I will hand it to my clerk to file.

(Whereupon, proceedings were concluded at 11:27 a.m.)

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STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, CHRISTINA MARIE AMUNDSON, a Certified Court Reporter in and for the states of Nevada and California, do hereby certify:

That I was personally present for the purpose of acting as Certified Court Reporter in the matter entitled herein;

That said transcript which appears hereinbefore was taken in verbatim stenotype notes by me and thereafter transcribed into typewriting as herein appears to the best of my knowledge, skill, and ability and is a true record thereof.

DATED: At Reno, Nevada, this 28th day of May 2019.

/S/Christina Marie Amundson, CCR #641
Christina Marie Amundson, CCR #641

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